

(21,636.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 209.

ALEXANDER D. JOHNSON, ELISE THOMAS BERRY,
LOUISE Y. B. DUVALL, IMOGENE BERRY TUBMAN,
ET AL., APPELLANTS,

vs.

THE WASHINGTON LOAN AND TRUST COMPANY.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA.

INDEX.

	Page
Caption	1
Transcript from the supreme court of the District of Columbia.....	1
Caption	1
Bill of complaint.....	2
Complainant's Exhibit No. 1—Deed, Edmonds to Sanders.....	11
No. 2—Bill, Middleton <i>et al. vs. Berry et al.</i> , and exhibits.....	13
No. 3—Decree, Middleton <i>et al. vs. Berry et al.</i> , <i>al., &c.</i>	27
No. 4—Will of Washington Berry.....	32
Order of publication....	35
Decree <i>pro confesso</i>	35
Proof of publication in "The Washington Law Reporter".....	36
Proof of publication in The Evening Star	37
Affidavit as to mailing copies of order of publication	38
Joint and several answer of first fourteen defendants.....	39
Replication.....	43

	Page
Testimony on behalf of complainant.	44
Testimony of John D. Coughlin	45
Thomas P. Woodard	49
Thomas J. Becker	51
Judson T. Cull	53
Julius A. Maedel	54
Judson T. Cull (recalled)	56
Judson T. Cull (recalled)	58
Testimony on behalf of defendants	61
Testimony of John B. N. Berry	61
Thomas W. B. Middleton	63
John B. N. Berry (recalled)	65
Exhibit J. B. N. B. No. 1—Transcript from records of deaths. .	66
Petition of the Washington Loan and Trust Company to be made party complainant.	67
Petitioner's Exhibit No. 1—Will of Henry P. Sanders	68
Order making the Washington Loan & Trust Company party complainant	70
Final decree	71
Appeal noted	71
Memorandum: \$50.00 deposited by defendants in lieu of appeal bond. .	71
Directions to clerk for preparation of transcript of record	72
Clerk's certificate	72
Minute entry of argument	73
Opinion	73
Decree	84
Motion for rehearing	85
Minute entry of submission of motion for rehearing	90
Order overruling motion for rehearing	90
Order allowing appeal	91
Bond on appeal	91
Citation and service	92
Designation of record on appeal	93
Clerk's certificate	94

In the Court of Appeals of the District of Columbia.

No. 1900.

ALEXANDER D. JOHNSON ET AL., Appellants,

vs.

THE WASHINGTON LOAN AND TRUST CO.

a Supreme Court of the District of Columbia.

No. 27071. In Equity.

THE WASHINGTON LOAN AND TRUST COMPANY, a Body Corporate,
Complainant,

vs.

ALEXANDER D. JOHNSON, ELIZE THOMAS BERRY, LOUISE Y. B. DUVALL, IMOGENE BERRY TUBMAN, EUGENE BENTON BERRY, JOHN H. BERRY, CLAUDE NATHANIEL BERRY, LEILA T. BERRY, FREDERICK B. BERRY, ALBERT L. BERRY, JOHN A. MIDDLETON, DAVID L. MIDDLETON, WASHINGTON B. MIDDLETON, THOMAS W. B. MIDDLETON, WASHINGTON L. BERRY, TIERNAN B. BERRY, WILLIAM F. BERRY, THOMAS O. BERRY, MARIA HUGHES KENNEDY, ADELAIDE SAVAGE MEALEY, LILLIE C. BOWIE, HENRY A. BERRY, EDWARD L. BERRY, and MARTHA A. BERRY, Defendants.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed, and proceedings had, in the above-entitled cause, to wit:—

Filed May 14, 1907.

In the Supreme Court of the District of Columbia.

No. 27071. In Equity.

HENRY P. SANDERS, Complainant,

v.

1, ALEXANDER D. JOHNSON; 2, ELIZE THOMAS BERRY; 3, LOUISE Y. B. DUVALL; 4, IMOGENE BERRY TUBMAN; 5, EUGENE BENTON BERRY; 6, JOHN H. BERRY; 7, CLAUDE NATHANIEL BERRY; 8, LEILA T. BERRY; 9, FREDERICK B. BERRY; 10, ALBERT L. BERRY; 11, JOHN A. MIDDLETON; 12, DAVID L. MIDDLETON; 13, WASHINGTON B. MIDDLETON; 14, THOMAS W. B. MIDDLETON; 15, WASHINGTON L. BERRY; 16, TIERNAN B. BERRY; 17, WILLIAM F. BERRY; 18, THOMAS O. BERRY; 19, MARIA HUGHES KENNEDY; 20, ADELAIDE SAVAGE MEALEY; 21, LILLIE C. BOWIE; 22, HENRY A. BERRY; 23, EDWARD L. BERRY, and, 24, MARTHA A. BERRY, Defendants.

To the Supreme Court of the District of Columbia, holding an Equity Court for said District:

The complainant, Henry P. Sanders, respectfully represents:

First. That he is a citizen of the United States and a resident of the City of Washington, District of Columbia, and brings this suit in his own right to remove from the title to the real estate hereinafter mentioned, the title to which is vested in fee simple in complainant, the cloud which is cast upon said title by the unfounded and invalid claims and pretensions set forth in the pending suit in this Court in Equity Cause No. 26,464, hereinafter more particularly mentioned and brought by the defendants hereto, numbered from one to fourteen, both inclusive, and to which the defendants hereto from fifteen to twenty-four, both inclusive, are defendants.

Second. The defendants are likewise citizens of the United States; that the said Elize Thomas Berry, Eugene Benton Berry, and Albert L. Berry reside in the City of Washington, District of Columbia; the said Louise Y. B. Duvall, Lillie C. Bowie and Martha A. Berry are residents of the City of Baltimore, State of Maryland; the said Imogene Berry Tubman is a resident of the City of Philadelphia, State of Pennsylvania; the said John H. Berry is a resident of the City of Roanoke, State of Virginia; the said Claude Nathaniel Berry is a resident of the City of San Francisco, State of California; the said Leila T. Berry and Frederick B. Berry are residents of Newport News, State of Virginia; the said John A. Middleton, David L. Middleton and Washington B. Middleton are residents of the City of New York, State of New York; the said Thomas W. B. Middleton is a resident of the City of Paterson, State of New Jersey; the said

Washington L. Berry is a resident of the City of Chicago, State of Illinois; the said Tiernan B. Berry, William F. Berry and Thomas C. Berry are residents of the City of San Francisco, State of California; the said Maria Hughes, Kennedy and Adelaide Savage
3 Mealey are residents of the City of Hagerstown, State of Maryland; the said Henry A. Berry is a resident of the Town of Aberdeen, State of Maryland; the said Edward L. Berry is a resident of the City of Memphis, State of Tennessee; and the said Alexander D. Johnson is a resident of the City of Baltimore, State of Maryland. All of said defendants are of lawful age, and are sued in their own right. The defendants, Thomas W. B. Middleton and Eugene Benton Berry, are also sued as Trustees as hereinafter set out.

Third. Complainant avers that he is seized in his demesne, as of fee, of certain lots and parcels of land situate in the District of Columbia, outside of the City of Washington, described as follows, to wit: All of lots 5, 6, 7, 18 and 19 in the Subdivision of a tract of land known as "Metropolis View" made by John A. Middleton and Thomas W. Berry, Trustees, as per plat filed with said Trustees' first report of sales in Equity Cause No. 500, Middleton *et al. versus* Berry *et al.* in the Supreme Court of the District of Columbia, a copy of which plat is recorded in Liber Governor Shepherd folio 41 of the Records of the Office of the Surveyor of said District. Said lots and parcels of land were conveyed to complainant by a certain deed from Lydia M. Edmonds, dated the 15th day of December, 1905, which said deed is recorded in Liber 2957 at folio 1 *et seq.*, one of the Land Records of said District of Columbia. Said real estate was conveyed to complainant in fee simple; all of which will more fully and at large appear by reference had to said deed, a duly certified copy of which is filed herewith marked "Complainant's Exhibit No. 1;" that said lots and parcels of land are parts of a
4 larger tract of land heretofore generally known, and hereinafter referred to, as Metropolis View, which tract contained about 410 acres of land, and which at the time of the death in the year 1856 of one Washington Berry, was owned in fee simple by him and was occupied by him as a home, and had been so owned and occupied by him for a long time previous to said year 1856, to wit: before July 28th, 1852, the date of the last will and testament of said Washington Berry, which is hereinafter referred to; that at the date of said will the said Washington Berry had five daughters, all of whom are named in said will, and all of whom were at that time unmarried, and all of them, except one, Anna Maria, were unmarried at the death of said testator, and although then married, the said Anna Maria, as complainant is informed and believes, had not then had born unto her any child.

Fourth. The complainant further avers that the grantor in the above mentioned deed derived her title, and he derives his title, to the real estate mentioned in paragraph 3 through numerous mesne conveyances of record, and under and through certain proceedings and decrees had and passed in and by this Honorable Court in a certain cause therein being known as Equity Cause No. 500, wherein John A. Middleton and Anna Maria, his wife, Allen L. Berry and

Amelia O., his wife, Alexander D. Johnson, and Mary E., his wife, were complainants and Eliza Thomas Berry, John H. Berry and Rosalie Eugenia, his wife, Washington L. Berry and Adelaide, his wife, Zachariah A. Berry and Elizabeth, his wife, and Thomas W.

Berry were defendants; that the bill in the said cause was filed in this court by W. D. Davidge as solicitor of the complainants thereto on the 28th day of August, 1865, in which bill it was stated, and so the fact is, as this complainant is informed and believes, that the said Anna Maria, Amelia Owen, Mary Elizabeth Louise, Eliza Thomas, Rosalie Eugenia, Washington L., Zachariah A. and Thomas W. were children of Washington Berry, late of Washington County, in the District of Columbia, who departed this life in 1856, leaving Eliza Thomas Berry his widow and said children his heirs at law; and in said bill it was further stated that by the last will and testament of said decedent, among other devises and bequests, he devised to his said widow, for and during her natural life, a certain estate in the County of Washington, District of Columbia, known as "Metropolis View," containing about 410 acres of land, and being the homestead of said testator, and provided that the said estate should be kept and reserved as a home and residence of said daughters so long as they should remain single and unmarried, and after the death of his widow, the said testator devised the said estate to his daughters being single and unmarried, and on the death or marriage of the last of them, directed that said estate should be sold by his executors and the proceeds of sale distributed by said executors, among his daughters living at his death and their children and descendants *per stirpes*, but reserved for his heirs generally the burial ground on said estate with the family vault, and upon such sale the testator enjoined his said sons or some of them to purchase said estate that it might be kept in the family;

that the said testator of said will appointed said Eliza Thomas Berry, his widow, and the said Washington L. Berry, executors thereof, all of which will more fully appear by reference to a copy of said will which the complainants filed therewith marked "J. A. M. Exhibit No. 1", and prayed to be taken as part of said bill. The said bill further stated, (and this complainant states such was the fact) that the said Eliza Thomas Berry, wife of the said testator, survived him and assumed the office of executrix of said will, and that said Washington L. Berry had declined to assume said office, and that at the death of said testator all his said daughters were unmarried, except the said Anna Maria Middleton, who was intermarried with said John A. Middleton; that the rest of said daughters had, except the said Eliza Thomas who remained single, intermarried with the respective parties therein above mentioned, and that all the said children and heirs at law of said testator had attained the age of 21 years, except the said Rosalie Eugenia, who was then 18 years of age; that the said estate of "Metropolis View" was not capable of advantageous partition among the said daughters to whom the same was devised as aforesaid, and that, if so capable, partition thereof could not be made owing to the non-age of said Rosalie Eugenia, and that the sale of said real estate would be to the

interest and advantage of said infant as well as of the other devisees thereof; that the said Eliza Thomas, the only one of said devisees unmarried, was willing to relinquish her right to the possession and enjoyment of said estate whilst unmarried, and to assent to the sale thereof, and the equal division of the proceeds of sale irrespective of such right of possession and enjoyment; that during the late war the said estate had been mainly in the occupation of soldiers by whom much injury had been done thereto, and that the rents and profits thereof had not been sufficient to pay taxes and make repairs; that the said vault had been by said soldiers dilapidated and destroyed, so that it was necessary to remove elsewhere the bodies therein deposited, and that in consequence of said dilapidation and destruction all the aforesaid heirs at law were willing that said burial ground should be sold with the residue of said estate and that the proceeds of said burial ground should be equally distributed among all of said heirs at law; and that the purchase and maintenance of said estate by said sons of said testator, or some of them, was impracticable for the want of means, and that the retention of said burial ground and vault, after the residue of said estate shall have passed into other hands, would not be in accordance with the intention of said testator, all of which averments in said bill will more fully appear by reference thereto, or to the certified copy thereof.

The complainant further states that all of the defendants to said Equity Cause No. 500, duly appeared and answered said bill, consenting to the relief prayed for therein, except the said Rosalie Eugenia Berry, for whom a guardian *ad litem* in her presence and with her consent was duly appointed by the court and made formal answer for her; the said Eliza T. Berry in and by her answer stated that she was willing to relinquish and thereby did relinquish upon the sale of the estate in the bill mentioned, her right to the possession and enjoyment thereof whilst unmarried, and consented to the distribution of proceeds of sale as prayed by said bill.

Whereupon the case was referred to the Auditor of the Court, (who at that time was Wm. Redin) by an order passed in said cause on the 19th day of September, 1865, with directions to him to take testimony and report the same to the court, and also to report whether the sale of the real estate in the bill mentioned would be to the interest of the infant defendant in said cause. And the said Auditor thereafter took the depositions of John A. Middleton, a party to said cause, and of Erasmus J. Middleton, a disinterested person, and thereafter on September 27, 1865, filed and submitted his report wherein he stated that Washington Berry had died in 1856 seized of the property consisting of a large mansion and 410 acres of land, having by his will of the 28th day of July, 1852, given the same, as well as portions of his personal property to his wife for life for the education and support of their five daughters, Anna M., Eliza T., Amelia O., Mary E. L., and Rosalie E., the same to be kept as a home for them as long as they or either of them should remain unmarried, and on the marriage or death of

the last, his wife being dead, he directed the said estate to be sold and the proceeds divided among his said daughters, reserving the family burial ground to his heirs, and urging some of his
9 sons to purchase the homestead that it might be kept in the family, and the Auditor further in said report stated that the widow of said testator shortly after his death discontinued her residence at the said homestead and removed with her family to the city and had since died; that all of said daughters had married, except said Eliza T., who had not resided at said homestead since her mother left it, and had offered to give up her right of occupation so as to advance the period of sale directed by the testator; that both of said witnesses had described the property as being an unfit residence for the unmarried daughter and the land as being generally poor and unproductive as a farm, and that the burial place had been demolished and that the buildings and fences had become much out of order and repair, and that it would be to the interest of all the parties that it be sold and in parcels, and that all the devisees desired a sale and that none of the testator's sons was in a condition to become a purchaser.

The Auditor accordingly stated that it was thought to be a fit case for a sale.

And the complainant herein files herewith a true copy of said report of the Auditor and of the depositions filed therewith, and of the pleadings and proceedings in said cause, from which will more fully appear the tenor and effect of said report and depositions, which compared copy is marked "Exhibit No. 2," and is to be taken as part hereof.

10 And the said complainant herein further shows that in said Equity Cause No. 500, the court passed a decree reciting that the cause standing ready for hearing, the proceedings were read and considered, and thereupon it ordered and decreed the real estate in the proceedings mentioned, being "Metropolis View," with the appurtenances, to be sold, and appointed John A. Middleton and Thomas W. Berry, Trustees to make such sale, and authorized them in their discretion to divide into parcels the said real estate and to sell said real estate so divided instead of as a whole, and on the final ratification of such sales and the payment of the purchase money to convey to the purchaser or purchasers in fee simple, the property to him or her or them sold, all of which will more fully appear by the compared copy of said decree herewith filed marked "Exhibit No. 3," and to be taken as part hereof.

The complainant herein further shows and states that the Trustees appointed in said Equity Cause divided said "Metropolis View" into lots numbered from 1 to 36, inclusive, and made sale at public auction of lots 24, 25, 26, 27 and 14 to John Maguire in October, 1865, and subsequently in the year 1868 upon the petition of said Mary E. L. Johnson and Rosalie E. Berry, two of the defendants to said Cause No. 500, stating that they had families and children to support and were in need of the money which would come to them in case of a sale of said real estate, the court ordered the said Trustees to proceed to sell the residue of said estate, and said Trustees there-

after sold at public sale the remaining lots in said subdivision and the sales aggregating over One Hundred Thousand Dollars were

11 subsequently finally ratified, on, to wit, October 12, 1868, and the Trustees authorized to convey said lots to the respective purchasers thereof, viz:

Lots 1 and 2 to R. Eichhorn.

Lots 3, 4, 8, 9, 13, 15, and 32 to Eliza T. Berry (a party to said cause).

Lots 5, 6, 7, 11, 12, 18 and 19 to W. D. Davidge.

Lots 10, 16, 17, 20, 21, 22, 23 and 36 to John A. Middleton.

Lot 14 to John Maguire.

Lot 28 to John Maguire.

Lot 29 to George Miller.

Lots 30 and 35 to said Rosalie E. Berry.

Lot 31 to A. Louise Berry (a party to said cause).

Lot 33 to Michael Connor.

Lot 34 to Mary E. Johnson (a party to said cause) and the complainant further states that the purchase money derived from said sales was, after deducting the proper expenses, paid to the five daughters of the aforesaid Washington Berry, all of which will more fully appear by reference to the proceedings in said Cause No. 500.

Fifth. Complainant further avers that he is informed and from his information believes the facts to be that between the years 1866 and 1871 deeds to the several purchasers aforesaid, from the Trustees in said Equity Cause No. 500 were duly recorded for all of said lots, except Lot 12, which was conveyed later; that in the interval of thirty-five years or more between the recording of said deeds and the filing of the Equity Cause No. 26,464 hereinbefore mentioned, the said tract "Metropolis View" was divided into hundreds of separate parcels or holdings with hundreds of different owners, and is now so held; that the intermediate conveyances and transactions affecting said holdings are numbered probably by the thousands; that during said interval the titles based upon said Equity Cause

12 No. 500 have been passed and approved without a question of doubt by all lawyers and title companies engaged in examining and passing titles, and the complainant further states that the title to the parcels of land conveyed to him, as set out in paragraph three of this bill, were sold to Walter D. Davidge, Esq., through whom, by mesne conveyances, the complainant derived title to the real estate described in said paragraph 3; that complainant and those under whom he claims have for thirty-five years or more been in exclusive and continuous possession and control of said property, and have during that time paid all taxes and assessments, relying upon the validity of their title acquired *bona fide* for a valuable consideration, without notice or suspicion of the adverse or hostile claim now set up in the aforesaid Equity Cause No. 26,464, hereinafter mentioned, or any other adverse claim.

Sixth. Complainant further avers and states that on the first day of August, 1906, the defendants hereto, Alexander D. Johnson, Elize Thomas Berry, Louise Y. B. Duvall, Imogene Berry Tubman, Eugene Benton Berry, John H. Berry, Claude Nathaniel Berry,

Leila T. Berry, Frederick B. Berry, Albert L. Berry, John A. Middleton, David L. Middleton, Thomas W. B. Middleton and Washington B. Middleton exhibited their bill of complaint in this court in Equity Cause No. 26,464 against the other defendants hereto, Washington L. Berry, Tiernan B. Berry, William F. Berry, Thomas C. Berry, Maria Hughes Kennedy, Adelaide Savage Mealey, Lillie C. Bowie, Henry A. Berry, Edward L. Berry and Martha A. Berry,

averring in substance, among other things, that in the year 1856, one Washington Berry, grandfather of all the parties to said cause, departed this life, seized and possessed of the tract of land which is described in the fourth paragraph of this bill, known as Metropolis View. That the said Washington Berry left him surviving, as his sole heirs at law, three sons, Washington L., Zachariah A., and Thomas W., and five daughters, Anna Maria, Amelia Owen, Mary E., Rosalie E., and Eliza T.; that he died testate, both as to his real and personal property; that the said will of Washington Berry contained the following clause:

"Item. It is my will and devise that my said homestead shall be kept and continued as the home and residence of my daughters so long as they shall remain single and unmarried. I therefore first after the death of my wife will and devise the said estate to my said daughters being single and unmarried and to the survivors and survivor of them so long as they shall be and remain single and unmarried, and on the death or marriage of the last of them I direct that the said estate shall be sold by my executors and the proceeds thereof be distributed by my said executors among my daughters living at my death, and their children and descendants, *per stirpes*, and I hereby reserve to my heirs the family vault and burial ground embracing half an acre of ground around and having the said vault as a center and on such sale as aforesaid by my said executors I earnestly enjoin it on my sons or some of their sons to purchase the said homestead that it may be kept in the family."

A true copy of said will is attached hereto marked Complainant's Exhibit No. 4, which is prayed to be read and considered as part hereof.

Said bill further averred that Eliza T. Berry, wife of Washington Berry, survived him, and died in 1864; that all of his daughters married, except Eliza T. Berry, who never married, and died in the month of — in the year 19—. Said bill then sets out, in detail,

the relationship of the parties to said cause, to the said Washington Berry, and how said relationship is derived, showing the complainants in said cause to be children of the daughters (other than Eliza T. Berry) of said Washington Berry. Said bill further avers that by said will, the said Washington Berry appointed his wife, and his son, Washington L. Berry, executors of his will and trustees of his estate; that the said Washington L. Berry declined to act as executor of said will, but whether he also declined to act as trustee complainants did not know; that said Washington L. Berry, deceased, survived the said Eliza T. Berry; that if the legal title to said property was vested in either the decedent, Eliza T. Berry, or the decedent, Washington L. Berry, that said title is now vested in the parties to said cause, or some of them. Said bill further avers

that under the terms of the will of said Washington Berry, upon the death of Eliza T. Berry, the daughter of said Washington Berry, the entire equitable interest in said real estate, vested in fee simple in the complainants to said bill; that by court proceedings in the case of John A. Middleton, *et al.*, v. Eliza T. Berry, *et al.*, being Equity Cause No. 500, in this court, said John A. Middleton and another were appointed to sell said land, and through deeds executed by them, said land was attempted to be sold and conveyed to various persons, and all of said land is now held by persons claiming adversely to complainants; that when said bill was filed and said sales were made by said trustees, the complainants Alexander D. Johnson, Elise Thomas Berry, John H. Berry, Leila T. Berry,

15 Albert L. Berry and John A. Middleton, were in existence; that they were all minors, and that none of them were made parties to said suit, or in anywise represented therein. Complainants therefore averred that their rights and interests in said lands were not affected by the proceedings in said case, or by any sales made by said trustees, John A. Middleton *et al.* Said bill in Equity Cause No. 26464 contained the usual prayers for process and general relief, and that a trustee or trustees might be appointed in place and stead of Eliza T. Berry and Washington L. Berry, named in the will of said Washington Berry, deceased, as trustees thereunder, and that the legal title vested in the parties to said last mentioned suit, or any of them, in said real estate be transferred to such trustee or trustees to be appointed by decree of this court. This complainant avers further that on the 20th day of February, 1907, a decree was passed in said Equity Cause No. 26464, appointing the defendants Thomas W. B. Middleton and Eugene Benton Berry trustees under the last will and testament of Washington Berry in the place and stead of Eliza T. Berry and Washington L. Berry, trustees of the last will and testament of the said Washington Berry, deceased; that since the passing of said decree no further proceedings have been had or taken in said cause, nor by said trustees in any manner to enforce any claim right or demand they may have or claim to have against this complainant by virtue of said will and of said decree.

Seventh. This complainant further avers that by virtue
16 of the will of the said Washington Berry, upon the proper interpretation thereof, and the interpretation thereof in said Equity Cause No. 500, and by virtue of the proceedings had and taken in said Cause No. 500 and of the conveyance made by the trustees in said cause, a good and indefeasible title in fee simple to said real estate described in paragraph third of this bill, passed to and became vested in the said purchaser from the said trustees, John A. Middleton and Thomas W. Berry, and that said title passed, by mesne conveyances, and is now vested in the complainant to this suit; that this complainant has also acquired and now has a good and indefeasible title to said real estate, by adverse possession; that he, and those under whom he claims, have been in actual, open, notorious and adverse possession, without any interruption whatever, of all of the real estate described in the third paragraph of this bill, for more than twenty years, to wit, for a period of over thirty-five years. Complainant avers that no question, claim or demand

has ever been made upon him, or those under whom he claims, in regard to his title to said real estate, so derived under said Equity Cause No. 500, as aforesaid, and until the said suit No. 26464 was brought by the said defendants hereto Nos. 1 to 14 against the defendants hereto Nos. 15 to 24, now pending in this Court, as aforesaid, such claim if it existed, was unknown to complainant; that the pendency of said cause, and the claims made therein, and the averments contained in the bill in said cause, constitute and create a cloud upon complainant's title, and a menace of future litigation

of such a public and notorious character, that although the
 17 same does not create a *lis pendens* as to complainant, it effectually prevents him from disposing of his property, either by sale or by encumbrance, and prevents examiners of titles from passing his title without mention of said pending cause; that the value of the land described in said paragraph 3 is over five thousand dollars.

Eighth. This complainant is advised that the construction given by this court in the aforesaid Equity Cause No. 500, as to the effect of said will of Washington Berry to vest in his daughters living at his death the absolute interest in the proceeds of sale and the right to have advanced the time for sale and distribution, the prior purposes and trusts having been accomplished, and the construction given to wills containing similar provisions, by this court in special and in General Term, by the Court of Appeals of the District of Columbia, and by the Supreme Court of the United States in cases arising in and affecting land situate in the District of Columbia, and among other cases, in the cases of *Coltman v. Moore*, 1 MacArthur 197 (decided in 1873); *Cropley v. Cooper*, 19 Wallace 167 (decided in 1873); and *Hauptman v. Carpenter*, 16 Appeals D. C. 524, which cases have not been overruled, establish beyond question the validity of the titles derived through the aforesaid Equity Cause No. 500.

Wherefore, complainant, being without remedy at law, brings this suit in equity and prays as follows:

18

Prayers.

1. That the parties named in the title to complainant's bill as defendants may be made parties defendant hereto, and that the United States writ of subpoena may issue commanding them to appear and answer the exigencies of this bill, and that upon said subpoena being returned "Not to be Found" as to any of said defendants, substituted service by publication in accordance with the Code of Laws in force in the District of Columbia may be had and taken.

2. That the title of complainant in and to the real estate described in said bill of complaint may be declared to be complete and perfect, and that the defendants and each of them, and their and each of their heirs and assigns, may be perpetually enjoined from asserting any title by sale or otherwise, or making any claim or demand to or against said real estate, or any part thereof, as against said complainants, their heirs and assigns, and especially that the defend-

ants, Thomas W. B. Middleton and Eugene Benton Berry, trustees as aforesaid, be restrained and enjoined from further proceedings, either in law or equity, or in any other manner, and from asserting or claiming any right, title or interest in and to the real estate described in complainant's bill.

3. That complainant may have such other and further relief as the nature of his case may require and to the court may seem just and proper.

HENRY P. SANDERS.

B. F. LEIGHTON,
Solicitor for Complainant.

19 DISTRICT OF COLUMBIA, ss:

I do solemnly swear that I have read the foregoing and annexed bill of complaint by me subscribed, and know the contents thereof, that the facts therein stated of my personal knowledge are true, and that those stated upon information and belief I believe to be true.

HENRY P. SANDERS.

Subscribed and sworn to before me this 11th day of May, A. D. 1907.

HARRY G. KIMBALL,
Notary Public, D. C.

[NOTARIAL SEAL.]

20 COMPLAINANT'S EXHIBIT No. 1.

Filed May 14, 1907.

Lydia M. Edmonds
to
Henry P. Sanders.

Deed in Fee. Recorded May 15th, 1906, 11:32 A. M. (50).

This indenture, Made this Fifteenth day of December in the year of our Lord one thousand nine hundred and five (1905) by and between Lydia M. Edmonds, (widow) of the City of Washington, District of Columbia, party of the first part, and Henry P. Sanders of the same place, party of the second part, witnesseth that the party of the first part, for and in consideration of ten (10.00) Dollars lawful money of the United States of America, to her in hand paid by the party of the second part, receipt of which, before the sealing and delivery of these presents, is hereby acknowledged, has given, granted, bargained and sold, aliened, enfeoffed, released, conveyed, and confirmed and does by these presents give, grant, bargain and sell, alien, enfeoff, release, convey and confirm unto the party of the second part, his heirs and assigns forever, the following described land and premises situate lying and being in the County of Washington, District of Columbia, and distinguished as all of lots numbered five (5) six (6) seven (7) eighteen (18) and nineteen

(19) on a plat of subdivision of "Metropolis View" (the farm formerly owned by the late Washington Berry) by John A. Middleton and Thomas W. Berry, Trustees, and filed with their first report of sales in the Chancery suit of Middleton, *et al.* against Berry, 21 *et al.*, No. 500, Equity Docket 7, in the Supreme Court of the District of Columbia, a copy of which plat is also recorded in Liber "Governor Shepherd," folio 41 of the Records of the Office of the Surveyor of said District of Columbia, Except as much of said lots numbered seven (7) and eighteen (18) as is included within the lines of Fourth Street, East extended, as shown on plat recorded in Liber County No. 9 folio 87, of the aforesaid Surveyor's office records. Said lots numbered five (5) six (6) seven (7) eighteen (18) and nineteen (19) containing inclusive of the land now embraced in Fourth Street, about twenty nine (29) acres and sixty seven one hundredths (67/100) of an acre of land, together with all and singular the improvements, ways, easements, rights, privileges and appurtenances to the same belonging, or in anywise appertaining, and all the estate, right, title, interest and claim, either at law or in equity or otherwise however, of the party of the first part, of, in, to or out of the said land and premises. To have and to hold the said land, premises and appurtenances unto and to the only use of the party of the second part, his heirs and assigns forever. And the said Lydia M. Edmonds her heirs, executors, and administrators, do hereby covenant and agree to and with the party of the second part, his heirs and assigns, that she the party of the first part and her heirs shall and will warrant and forever defend the said land and premises and appurtenances unto the party of the second part, his heirs and assigns, from and against the claims of all persons claiming or to claim the same, or any part thereof, 22 or interest therein, by, from, under or through them or any of them. And further that the party of the first part and her heirs shall and will at any and all times hereafter, upon the request and at the cost of the party of the second part, his heirs and assigns, make and execute all such other deed or deeds, or other assurances in law, for the more certain and effectual conveyance of the said land and premises and appurtenances unto the party of the second part, his heirs or assigns, as the party of the second part, his heirs or assigns, or his or their counsel learned in the law shall advise, devise or require. In testimony whereof, the party of the first part has hereunto set her hand and seal on the day and year first hereinbefore written.

LYDIA M. EDMONDS. [SEAL.]

Signed, sealed and delivered in the presence of
E. F. CAVERLY.

DISTRICT OF COLUMBIA, *To wit:*

I, Edward F. Caverly a Notary Public in and for the said District of Columbia, do hereby certify that Lydia M. Edmonds, widow, of the City of Washington, District of Columbia, party to a certain Deed bearing date on the 15th day of December A. D. 1905, and

hereunto annexed, personally appeared before me in the said District of Columbia, the said Lydia M. Edmonds being personally well known to me as the person who executed the said deed, and acknowledged the same to be her act and deed. Given under my hand and official seal this 16th day of December A. D. 1895.

[NOTARIAL SEAL.]

EDWARD F. CAVERLY,

Notary Public.

23

OFFICE OF RECORDER OF DEEDS,
DISTRICT OF COLUMBIA.

This is to certify that the foregoing is a true and verified copy of an instrument as recorded in Liber No. 2957, folio 1 *et seq.*, one of the Land records of the District of Columbia.

In testimony whereof I have hereunto set my hand and affixed the seal of this office this 9th day of May, A. D. 1907.

[SEAL.]

R. N. DUTTON,

Deputy Recorder of Deeds, Dist. of Columbia.

24

COMPLAINANT'S EXHIBIT No. 2.

Filed May 14, 1907.

50 ct. Stamp.

To the Supreme Court of the District of Columbia in Chancery:

John A. Middleton and Anna Maria Middleton his wife, Allen Lucien Berry and Amelia Owen Berry his wife and Edward Dorsey Johnson and Mary Elizabeth Louisa Johnson his wife bring this their Bill of Complaint against Eliza Thomas Berry, John N. B. Berry and Rosalie Eugenia Berry his wife, Washington L. Berry and Adalaide Berry his wife, Zachariah B. Berry and Elizabeth Berry his wife and Thomas W. Berry, all the said parties being of the State of Maryland.

And thereupon complainants show that the said Anna Maria, Amelia Owen, Mary Elizabeth Louisa, Eliza Thomas, Rosalie Eugenia, Washington L., Zachariah B. and Thomas W. are the children of Washington Berry late of Washington County in the District of Columbia, who departed this life on the — day of — 1856, leaving Eliza T. Berry his widow and the said children his heirs at law; that by the last Will and Testament of the said decedent

defendant, among other devises and bequests, he devised to his said widow for and during her natural life a certain estate in said County known as Metropolis View and containing about four hundred and ten acres of land and being the home-
stead of said testator and provided that said estate should be kept and reserved as the home and residence of his said daughters so long as they should remain single and unmarried and after the death of his said widow the said testator devised the said

25

estate to his daughters being single and unmarried and on the death or marriage of the last of them directed that said

estate should be sold by his executors and the proceeds of sale distributed by said executors among his daughters living at his death and their children and descendants (*per stirpes*) but reserved for his heirs generally the burial ground on said estate with the family vault, said burial ground embracing half an acre of land around said vault as a centre and upon such sale the said testator enjoined his said sons or some of them to purchase said estate that it might be kept in the family; and that said testator by said will appointed said Eliza T. Berry, his widow, and said Washington L. Berry executors thereof; all which will more fully appear by reference to a copy of said will which complainants file herewith marked J. A. M. Exhibit No. 1 and pray may be taken as part hereof.

That said Eliza T. Berry wife of the said testator survived him and assumed the office of Executrix of said will but that said Washington L. Berry declined to assume said office.

That at the death of said testator all his said daughters were unmarried except the said Anna Maria Middleton who was then intermarried with said John A. Middleton; that the rest of said daughters have, except said Eliza Thomas, who remains single, intermarried with the respective parties above-mentioned and that all the said children and heirs at law of said testator have attained the age of twenty-one years except the said Rosalie Eugenie, who is now
26 eighteen years of age. That the said estate of Metropolis

View is not capable of advantageous partition among said daughters to whom the same was devised as aforesaid and that, if so capable, partition thereof could not be made owing to the non-age of said Rosalie Engenia and that the sale of said Estate will be to the interest and advantage of said infant as well as of the other devisees thereof. That the said Eliza Thomas, the only one of said devisees unmarried is willing to relinquish her right to the possession and enjoyment of said estate whilst unmarried and to assent to the sale thereof and the equal division of the proceeds of sale, irrespective of said right of possession and enjoyment. That during the late war said estate has been mainly in the occupation of soldiery by whom much injury has been done thereto and that the rents and profits thereof have not been sufficient to pay taxes and make repairs. That the said vault has been by said soldiery dilapidated and destroyed so that it was necessary to remove elsewhere the bodies therein deposited and that in consequence of said dilapidation and destruction all the aforesaid heirs at law are willing that said burial ground and vault should be sold with the residue of said estate and that the proceeds of said burial ground and vault should be equally distributed among all the said heirs at law.

Complainants further show that the purchase and maintenance of said estate by said sons of said testator or some of them is impracticable for the want of means and that the retention of said burial ground and vault after the residue of the estate shall
27 have passed into other hands would not be in accordance with the intention of said testator.

To the end that the said Eliza Thomas Berry, John N. B. Berry and Rosalie Eugenia Berry his wife, Washington L. Berry and

Adalaide Berry his wife, Zachariah B. Berry and Elizabeth Berry his wife and Thomas W. Berry may answer the premises, the said Rosalie Eugenia by guardian to be appointed, and that the said estate of Metropolis View may with the appurtenances be sold and the proceeds of sale equally divided among the aforesaid daughters of said testator, devisees thereof, except only such proceeds as may be apportioned to said burial ground and vault and that as to such proceeds so apportioned the same may be equally divided among all the aforesaid heirs at law and that the complainants may have such other and further relief as may be just and their case may require. May it please the Court to grant subpoenas, &c., & as in duty, &c., &c.

W. D. DAVIDGE,
Sol'r for Compl'ts.

Endorsed: 500. John A. Middleton, *et al. vs.* Eliza Thomas Berry, *et al.* Bill & 1 Exhibit. R. J. Meigs, Clk. &c. File this & issue. Davidge, for Compl'ts. Filed 28 Aug., 1865. \$10
28 deposited by Mr. Davidge. 50 for stamp by Mr. Davidge.
Set for hearing by Consent Oct. 3, 1865. Davidge, for Compl'ts. F. W. Jones, for Def't. W. Y. Fendall, for Def'ts.

"In the name of God Amen.

I, Washington Berry of Washington County of the District of Columbia being in perfect — of body and of sound and disposing mind memory and understanding considering the certainty of death and the uncertainty of the time thereof and being desirous to settle my worldly affairs and thereby be the better prepared to leave this world when it shall please God to call me hence do therefore make and publish this my last will and testament in manner and form following that is to say.

First,—and principally I commit my Soul unto the hands of Almighty God who gave it and my body to the earth to be decently buried at the discretion of my executors and after my debts and funeral expenses have been paid I give devise and bequeath as follows:

Item 1st. I give devise and bequeath to my son Washington L. Berry his heirs and assigns all the lands together with all their hereaditaments and appurtenances of which I may die seized and
29 possessed situated in Washington County Maryland called and known by the name of the Long Meadows or Springs Paradise or by any and whatsoever other name any part of the said lands in the said County may be known or called containing 570

32

acres and 22 perches according to the deed from George I. Harry to me, provided the said Washington L. Berry and his heirs shall before this devise shall take effect and before he and they shall enter possession of the said lands execute acknowledge and deliver a deed of bargain and sale release and confirmation to my daughters jointly to their heirs or assigns of the estate of one half of Belle Vue on the Potomac River which was devised to him the said Washington

L. Berry by his Grand Father Zachariah Berry and if the said Washington L. Berry and his heirs shall refuse to execute the said deed or neglect and delay the same for the space of two years then this devise not to take effect and the lands heretofore given shall go to and be divided among my daughters living share and share alike.

Item 2nd. I give devise and bequeath to my son Zachariah Berry his heirs and assigns the lands and estate called Belle Mont purchased of Richard C. Bowie containing Two hundred and ninety acres being in Prince Georges County State of Maryland and also an adjoining tract purchased of Edmund B. Duval called Rileys Discovery containing one hundred and nineteen acres containing four hundred and nine acres in both tracts. Provided the said Zachariah Berry and his heirs shall before the devise shall take effect and before he and

30 they shall enter into possession of the said lands execute acknowledgment and deliver a deed of bargain and sale release and confirmation to my daughters jointly to their heirs and assigns of the estate one half called Belle View on the Potomac River which was devised to him by his Grand Father. Zachariah Berry and if the said Zachariah Berry and his heirs shall refuse to execute the said deed and neglect or delay the same for the space of two years then this devise not to take effect and the lands hereinbefore given shall go to and be divided among my daughters living at my death share and share alike.

Item 3rd. I give devise and bequeath to my son Thomas W. Berry his heirs and assigns my farm called Blue Plains containing Five hundred acres including Addison's Good Will all of which I purchased of John Marbury and also One hundred and thirty one acres I purchased of Charles B. Hambleton all of which lands lie on the Potomac River in the District of Columbia and partly in Prince Georges County State of Maryland.

Item. —. Although I have in the devise hereinbefore made to my three sons Washington L., Zachariah and Thomas W. Berry used words of importance yet I do hereby expressly annex to the several estates so given to them this limitation that if either of them shall die without leaving lawful issue that the estate of each one or both if more than one shall go to the survivor or survivors his and their heirs.

Item 4th. I give devise and bequeath to my dear wife Eliza T. Berry if she should survive me for and during her natural life the

31 Homestead estate on which I now reside called Metropolis View, containing four hundred and ten acres also all my stocks in the Corporation of the City of Washington also all my stocks in the debt of the State of Maryland also all and whatsoever other stocks I may have at my death in any state or corporation and all rents and all the money I may then have on hand or which may be due me on bond, bill or notes otherwise, subject nevertheless the whole and every part of the said bequest to my said wife in the first place to the proper and comfortable support and maintenance and education according to their condition and prospects of my five daughters Anna Maria, Eliza Thomas, Amelia Owen, Mary Elizabeth Louisa and Rosalie Eugenia Berry so long as they and each of them remain single and unmarried and upon their marriage and

birth of issue of each and every of them respectively to pay and deliver to such one or more so married and having issue her just, full and equal sixth part of the personal estate so as aforesaid given to my said wife.

Item 5th. It is my will and desire that my said homestead shall be kept and continued as the home and residence of my daughters so long as they shall remain single and unmarried. I therefore first after the death of my wife will and devise the said estate to my said daughters being single and unmarried and to the survivor and survivors of them so long as they shall be and remain single and unmarried and on the death or marriage of the last of them then I direct that the said estate shall be sold by my executors and the proceeds thereof be distributed by my said executors among my daughters

32 living at my death and their children and descendants (*per stirpes*) and I hereby reserve to my heirs the family vault and burial ground embracing half an acre of ground and having the said vault as a centre and on such sale as aforesaid by my executors I earnestly enjoin on my sons or some of these sons to purchase the said homestead that it may be kept in the family.

Item 6th. I direct that my executors shall divide and distribute all the rest residue and remainder of my personal estate among my children at my death and the descendants of such as may have died during my life to take a parent's part.

Item 7th. If any one or more of my devisees or legatees hereinbefore named shall institute any action at law or in chancery to set aside this my solemn and deliberate disposition of my property, I hereby revoke and make void every devise and bequest to such person or persons or through or by means of which they would otherwise derive any benefit or advantage hereinbefore made and I give to such person and persons each and every of them the sum of one hundred dollars to be paid to him her or them by my executors in full of all the interest claim or demand which he, she or they might otherwise have upon any part of my estate by reason of any matter or thing hereinbefore contained so of his her or their being entitled as heir or heirs distributor or distributors to any part thereof. And I will and devise bequeath and direct that the interest or estate which shall or may have been given heretofore to such person or persons so contesting the validity of this will or any part thereof or

33 which he, she or they may or might otherwise claim by reason of any matter or thing hereinbefore contained shall fall into the general residue of my said estate and be divided and distributed among my heirs and distributees excluding therefrom him her or them who shall have instituted such suit or action.

Finally I appoint Eliza T. Berry my wife and my son W. L. Berry my executors of this my last will and testament and Trustees of my estate

In testimony whereof I have hereunto set my hand and seal this twenty eighth day of July in the year of our Lord eighteen hundred and fifty two 1852.

WASHINGTON BERRY. [SEAL.]

Sealed signed and delivered and published by Washington Berry in our presence being his last will and testament who herein sign our names as witness our hands and seals.

JOHN R. MITCHELL. [SEAL.]
WM. S. MITCHELL. [SEAL.]
E. BARTON GREENWELL. [SEAL.]

DISTRICT OF COLUMBIA, *Washington County, To wit:*

Officer of Register of Wills.

OCTOBER 3RD, 1865.

I hereby certify that the foregoing is a true copy of the main body of the last Will and Testament of Washington Berry, deceased, as recorded in this Office upon the Records thereof.

Test: Z. C. ROBBINS,
[SEAL.] *Reg's. of Wills.*

5 ct. Int. Rev. Stamp.

34 Endorsed: 500- Chy. Middleton & *al. v. Berry & al.* Exhibit No. 1. Last Will of Washington Berry. Filed Aug. 28, 1865. R. J. M., Cl'k.

35 Sup. Ct. of the Dt. of Columbia.

No. —. In Chancery.

MIDDLETON & AL.

v.

BERRY & AL.

On motion of the Sol'r of the Compl'ts in the above entitled cause it is ordered this 19th day of September 1865, that the same be & is hereby referred to the Auditor of this Court with directions to take such testimony as may be adduced by the parties and to report the same to this Court & also to report whether the sale of the real estate in the bill mentioned will be for the interest & advantage of the infant defendant in said cause.

By order of the Court.

Endorsed: 500 Eq. Doc. 7. For Monday 25th Sep. 11 o'clk. Middleton & *al. v. Berry & al.* Order of Reference to Auditor. Filed—Sept. 19, 1865. R. J. M., Cl'k. Recorded Eq. M. 1 p. 475.

36 To the Supreme Court of the District of Columbia, in Chancery:

The answer of Eliza Thomas Berry to the Bill of Complaint of John A. Middleton and others.

This Respondent admits all and singular the matters and things in the said bill alleged and is willing to relinquish and hereby re-

linquishes upon the sale of the Estate in the bill mentioned her right to the possession and enjoyment thereof whilst unmarried and consents to the distribution of proceeds of sale as prayed by said bill.

And having fully answered she prays to be hence dismissed with costs &c.

And as in duty &c.

ELIZA T. BERRY.

N. Y. FENDALL,
Sol'r for D'ft.

STATE OF MARYLAND, *Baltimore City, To wit:*

On this eighth day of September in the year of our Lord Eighteen Hundred and sixty-five before the subscriber a Justice of the Peace of the State of Maryland in and for the said City personally appeared the above named Eliza Thomas Berry and makes oath that the matters stated in the foregoing answer are true to the best of her knowledge and belief.

ALLEN E. FORRESTER, *J. P.*

5 ct. Int. Rev. Stamp.

37 STATE OF MARYLAND, *Baltimore City, set:*

5 ct. Int. Rev. Stamp.

I hereby certify, That Allen E. Forrester Esquire before whom the annexed affidavit was made, and who has thereto subscribed his name, was, at the time of so doing, a Justice of the Peace of the State of Maryland, in and for the City of Baltimore, duly commissioned and sworn.

In testimony whereof, I hereto set my hand and affix the seal of the Superior Court of Baltimore City, this Eighth day of September A. D. 1865.

[SEAL.]

ALFORD MACE.

Clerk of the Superior Court of Baltimore City.

Endorsed: 500 Eq. Doc. 7. Middleton & *al. vs. Berry & al.* Answer of Eliza T. Berry. The Clerk will please file this Answer. W. Y. Fendall, Sol'r for Def't. Filed—Sept. 19, 1865, R. J. Meigs, Cl'k.

38 No. 500. Equity.

MIDDLETON and Others
agt.

BERRY and Others.

By the order of the 19th inst., I am directed to take testimony, and report, "whether the sale of the real estate mentioned in the bill will be for the interest and advantage of the infant defendant in the cause."

I gave due notice of the execution of the order for the 25th in-

stant, and Mr. Davidge, John A. Middleton and one of the Complainants, and Erasmus I. Middleton, not connected with any of the parties, appeared. I have taken and return the deposition of the two last named and respectfully submit the following report.

Washington Berry died seized of the property in 1856, (which consists of a large mansion and 410 acres of land, within a mile and a half of Washington, on its northern border, over-looking the City),—having by his will of the 28th July 1852, given the same, as well as portions of his personal property, to his wife for life, for the education and support of their five daughters, Anna M.—Eliza T.—Amelia O.—Mary E. L.—and Rosalie E.—, the same to be kept as a home for them, so long as they and each of them should remain unmarried, and on the marriage or death of the last, his wife being dead, he directed the said Estate to be sold, and the proceeds divided among his said daughters, reserving the family burial ground to his heirs, and urging some of his sons to purchase the homestead that it might be kept in the family.

39 That his widow shortly after the testator's death discontinued her residence at the said homestead, and removed with her family to the City, and has since died.

That all the said daughters have married, except Eliza T. Berry, and all are of full age, except Rosalie E.

That Eliza T. Berry has not resided at the said homestead since her mother left it, and now offers to give up her right of occupation, so as to advance the period of sale directed by the testator.

That is the only parcel of property these parties own in this District, whose residences are in Maryland.

The witnesses both describe the property as being an unfit residence for the unmarried daughter, and the land as being generally poor, and unproductive as a farm to live by; that the testator did not use it as such, but as a mere place of residence; and that it is fit only, as a whole, for a man of fortune; that, within the past few years, the burial place has been demolished and the buildings and fences have become much out of order and repair.

They both state, that it could not be divided among the five daughters advantageously, and recommend a sale as being most to the advantage, not only to the infant defendant, but also of all the parties; and they express the opinion, that, if sold in parcels, it would, at this period of rise in the price of District property, average \$300.— an acre, and produce 120,000 or 130,000.

The opinion of these witnesses, both intimately acquainted with the property, and men of character and judgment is entitled
40 entitled to great weight; but, notwithstanding, it is supposed, that these 410 acres of land might be divided specifically, and the values of the respective portions equalized. Still, it is doubtful, whether any specific division that Commissioners could make would be satisfactory to the parties, and whether more just equality, as well as entire satisfaction, would not be attained by a public sale. The Testator himself contemplated that a sale would be necessary on the marriage of his last daughter to produce equality among them; and Mr. John A. Middleton states, that all the devisees desire a sale,

the last unmarried daughter having waived her right of exclusive possession and enjoyment in order to advance the period and produce a sale; and that none of the testator's sons is in a condition to become a purchaser.

It is thought to be a fit case for a sale.

The fact of the property being, possibly, susceptible of specific partition has been adverted to, only in consequence of the rule of the old Court, not to decree a sale, under the act of '85, of property in which infants were interested, jointly or in common, if the same could be so divided, though a sale might be to their interest and advantage; a rule to which the Court inflexibly adhered. The correctness of that ruling was, however, always questioned at the bar; but, being a safe rule, and a mere matter of discretion in the Court, exercised apparently in preservation of the infant's property, and therefore doubtful whether an appeal would lie; no one cared to take an appeal.

41 The words of the act of '85, are: "If any infant shall have a joint interest or interest in common with any other person, in any lands, &c., and it shall appear to the Chancellor, upon examination of all the circumstances, that it will be for the interest and advantage, both of the infant and the other parties, to sell, the Chancellor may order such lands &c. to be sold, upon such terms as he shall direct." And by the act of '94, he may decree partition between similar parties under the same circumstances.

The practice in Maryland under the act of '85 was, that, where it was shown or appeared from the property itself, or the condition of the heirs, or by positive proof, that a sale could be to the interest and advantage of all the parties concerned, it was in the discretion of the Court in such case, to authorize and direct a sale for the purpose of division, or not, as, under all the circumstances, it should think fit and right.

I had the honor first to present this question to the present Court in McCleary's case No. 1747 Equity; where clearly the property was susceptible of specific partition; but it was proved that a sale would be advantageous to all the heirs, minors as well as adults; and in which a sale was decreed by the Chief Justice. The question occurred again in *Sheriff v. Dean*, No. — Equity, — similar to the present, — being an application for the sale of a farm of between 300 and 400 acres, across the Eastern branch, which was capable of being divided among the heirs, but who, it was proved, would be benefited by a sale thereof.

42 That case came on for hearing before Mr. Justice Wylie, who, at first doubted, but, upon argument, and, as Mr.

Stephens, the Counsel engaged, informed me, on authority of *Harris v. Harris*, 6 Gill & John 111, decreed a sale. There has been no preliminary enquiry in that case before me; but, in the next case, that arose—*Moberly v. Brasheard* No. — Equity, where the witnesses proved, that a partition could be easily effected, but that it would be advantageous to the heirs to sell for the purpose of division—I followed the previous rulings in *McCleary's* case and in *Sheriff v. Dean*, and the same Judge, who decided the latter, decreed a sale.

The Auditor has presumed to advert to these rulings from the

great value of the Estate which the Court is now asked to pass to a sale, and from anxiety—(prejudice, it may be, from early education, as to the sanctity of minor's property)—that the sale, if decreed in this case, should be placed upon sustainable ground, and be in conformity with the rulings of the Court in other similar cases.

Respectfully submitted,

W. REDIN, *Audr'r.*

26 Sep. 1865.

43

No. 500. In Equity.

JOHN A. MIDDLETON ET AL.

vs.

ELIZA THOMAS BERRY ET AL.

Deposition of John A. Middleton, Being Shown by Auditor.

I am a complainant in this cause, and the husband of Anna Maria Middleton also a complainant. She is a daughter of the late Washington Berry late of Washington County, District of Columbia. He died I think in October, 1856. He left a widow named Eliza T. Berry, she is dead now. He left Washington L. Berry, Zachariah Berry, Thomas W. Berry his sons, and Anna Maria Middleton, who was the only daughter married at his death; Eliza Thomas Berry, Amelia Owen Berry Mary Elizabeth Louisa Berry and Rosalie Eugenia Berry his daughters,—three sons and five daughters Eliza Thomas Berry is now single. All the other daughters are now married. Amelia Owen Berry is now intermarried with Allen Lucien Berry and Mamie Elizabeth Louisa Berry is intermarried with Edmond Dorsey Johnson and Rosalie Eugenia Berry is intermarried with John B. B. Berry. All the children of the said Washington Berry deceased are of full age except Rosalie Eugenia Berry. I know the estate called Metropolis View near this Washington City, D. C., and the late residence of said Washington Berry. It contains about four hundred and ten acres. It is about a mile and a half or two miles from, and north of the Capitol. It is improved by a double brick house, two stories and an attic and a barn and stable and two houses for tenants (over-seer, &c.) and other improvements. I think the property is now

44 in very poor condition. The house is in poor condition out of repair. The family vault is entirely broken up. The bodies were removed by the family. The land, portions of it, was naturally very poor at the time of Mr. Berry's death, there was a good deal of fine timber. Some, not all, of it has been cut down. The fences are very poor, much of it removed or destroyed but not entirely. I do not think that as a farm it could be cultivated with a view to an income. Mr. Berry did not use it for any such purpose. He only used it as a residence. He did not farm it, to any extent. He did not make it sustain itself. In my opinion the farm will not sustain itself. It is a place for an amateur farmer. I do not see how the farm could be divided

to advantage. No satisfaction could be given to the heirs by any division and in addition none of the heirs desire any division, not one of them desire it. They would object to any division of the property, and prefer a sale. It would be greatly to the advantage of the minor heirs and of all the parties to have the property sold we think the property will now bring more money than at any future day within the next ten or fifteen years, and a refusal of this application now would, in the opinion of the minor and all the other heirs, result in a large loss to the heirs. And the capital raised from it by a sale would be much more productive than the real estate itself could possible be.

Eliza Thomas Berry consents to give up her right of occupation and the result of her so doing will be to give the other daughters, including the one under age the present enjoyment of the
45 devise to them instead of having that enjoyment deferred until Eliza either dies or married. Eliza has not resided on the farm since about a year after her father's death, the widow declining to use it as a residence for herself and daughters. The place, since Mr. Berry's death, has produced very little if anything above the expenses, and if the repairs has been properly attended to it would have brought the place in debt.

I should think that if the property was sold judiciously, divided up into parcels, it would bring three hundred dollars an acre. If sold as a whole it might not bring much over half of that.

None of the sons are in a condition to buy or maintain the property.

JOHN A. MIDDLETON.

Erasmus I. Middleton, being sworn by the Auditor, says I have known the property called Metropolis View for the last thirty years, living near it all that time, with the exception of three or four years. I know the place intimately and have been the agent for it for the last three years or thereabouts. I do not see how it could be divided among the five daughters advantageously. There is a large portion of the land (back land) very poor and how to average the same so as to equalize it I cannot see, owing to the position of the house and woodland. I do not see how the woodland and the supply of water could be divided advantageously, if at all. If any division could be made, the interest of each daughter would have to be in detached parcels, but I do not see how it could be divided at all, without disadvantage to all the parties.

46 The last two years, the property has not much more than paid the taxes on it. The building on the property which with the stable I understood cost when built twenty-two thousand dollars, would be a considerable impediment to a division of the estate.

For the last five or six years the estate has yielded comparatively nothing.

It would be to the interest and advantage of all the heirs that the property should be sold. I think it would be to Eliza Berry's interest to give up her right of enjoyment and take a one-fifth in-

terest in the proceeds of sale. I have advised the family that a sale would be to the advantage of all concerned.

I would not think a sale of the property as a whole —. If judiciously divided and sold speedily, I should think it would sell for about three hundred dollars an acre. It would average about that. The land is very unequal in value and it is hard to say what it would bring.

E. J. MIDDLETON.

Endorsed: 500. Equity. Middleton v. Berry. Report upon sale. &c. Filed Sept. 27, 1865, R. J. M., Clk.

47 To the Supreme Court of the District of Columbia, in Chancery:

The Answer of Washington L. Berry and Adelaide Berry, His Wife, to the Bill of Complaint of John A. Middleton and Others.

The respondents admit the matters and things in said bill alleged and consent to the granting of the prayer thereof.

W. L. BERRY.
A. H. BERRY.

Test:

WM. M. TICE.

W. Y. FENDALL,
Sol. for D'ft.

STATE OF MARYLAND, *Washington County, To wit:*

On this ninth day of September in the year eighteen Hundred and Sixty five before the subscriber a Justice of the Peace of the State of Maryland in and for the said County personally appeared Washington L. Berry and Adelaide his wife the above named respondents and make oath that the matters stated in the foregoing answer are true to the best of their knowledge and belief.

WM. M. TICE, *J. P.*

STATE OF MARYLAND, *Washington County, To wit:*

I, Lewis B. Nyman, Clerk of the Circuit Court for Washington County, do hereby certify that Wm. M. Tice, Esq., before whom the above and annexed affidavit was made, and who hath here-
48 unto subscribed his name, was at the time of so doing, one of the Justices of the Peace of the State of Maryland, in and for said County, duly elected, commissioned and sworn, and that his signature is genuine.

In testimony whereof, I have hereunto signed my name and affix the seal of the Circuit Court, aforesaid, this ninth day of September, A. D. 1865.

[SEAL.]

LEWIS B. NYMAN, *Clerk.*

Sup. Ct. Dt. of Columbia.

No. 500. In Chancery.

MIDDLETON ET AL.

vs.

BERRY ET AL.

The Answer of Rosalie Eugenia Berry, by John B. N. Berry, Her Guardian ad Litem, to the Bill of Complaint of John A. Middleton & Others.

The said defendant answering says she is an infant under the age of twenty one years and submits her rights & interests in the premises to the court.

ROSALIE B. BERRY,
By JOHN B. N. BERRY,
Guardian ad Litem.

Personally appeared before me this 11th day of September, 1865, John B. N. Berry guardian *ad Litem* of Rosalie Eugenia Berry & took oath in due form of law that the matters in the foregoing answer are true to the best of his knowledge & belief.

R. J. MEIGS, *Clerk.*

Sept. 11, 1865.

49 To the Supreme Court of the District of Columbia, in Chancery:

The Answer of John B. N. Berry to the Bill of Complaint of John A. Middleton and Others.

This respondent admits the matters and things in said bill alleged and consent- to the granting of the prayer thereof.

JOHN B. N. BERRY.

STATE OF MARYLAND, *Baltimore City, To wit:*

On this ninth day of September in the year Eighteen Hundred and sixty five before the subscriber a Justice of the Peace of the State of Maryland in and for said county personally appeared the above named J. B. N. Berry and made oath that the matters stated in the foregoing answer are true to the best of his knowledge and belief.

ALLEN E. FORRESTER, *J. P.*

W. Y. FENDALL,
Sol'r for D'ft.

STATE OF MARYLAND, *Baltimore City, set:*

I hereby certify, that Allen E. Forrester, Esquire, before whom the annexed affidavit was made, and who has thereto subscribed his name, was, at the time of so doing, a Justice of the Peace of the State of Maryland, in and for the City of Baltimore, duly commissioned and sworn.

In Testimony Whereof, I hereto set my hand and affix the seal of the Superior Court of Baltimore City, this 9th day of September A. D. 1865.

[SEAL.]

ALFORD MACE,
Clerk of the Superior Court of Baltimore City.

50 To the Supreme Court of the District of Columbia, in Chancery:

The Answer of Thomas W. Berry to the Bill of Complaint of John A. Middleton and Others.

This respondent admits the matters and things in the said bill alleged and consents to the granting of the prayer thereof.

THOMAS W. BERRY.

W. Y. FENDALL,
Sol'r for D'ft.

STATE OF MARYLAND, *Baltimore City, To wit:*

On this eighth day of September in the year of our Lord Eighteen Hundred and sixty five before the subscriber a Justice of the Peace of the State of Maryland in and for the said County personally appeared the above named Thomas W. Berry and makes oath that the matters and things stated in the foregoing answer are true to the best of his knowledge and belief.

ALLEN E. FORRESTER, *J. P.*

STATE OF MARYLAND, *Baltimore City, set:*

I hereby certify, That Allen E. Forrester, Esquire, before whom the annexed affidavit was made, and who has thereto subscribed his name, was, at the time of so doing, a Justice of the Peace of the State of Maryland, in and for the City of Baltimore, duly commissioned and sworn.

51 In Testimony Whereof, I hereto set my hand and affix the seal of the Superior Court of Baltimore City, this eighth day of September A. D. 1865.

[SEAL.]

ALFORD MACE,
Clerk of the Superior Court of Baltimore City.

To the Supreme Court of the District of Columbia, in Chancery:

The Answer of Zachariah Berry of W. and Elizabeth C. Berry, His Wife, to the Bill of Complaint of John A. Middleton and Others.

These respondents admit the matters and things alleged in said bill and consent to a decree for the sale of the estate of Metropolis View and the distribution of the proceeds of sale as prayed; and having fully answered they pray to be hence dismissed with costs &c.

ZACHARIAH BERRY of W.
ELIZABETH C. BERRY.

WILL Y. FENDALL,
Sol'r for D'fts.

STATE OF MARYLAND, *Prince Georges County, To wit:*

Before me the subscriber a Justice of the Peace in and for Prince George's County in the State of Maryland personally appeared this seventh day of September 1865 Zachariah Berry of W. and Elizabeth C. Berry his wife whose signatures are affixed to the foregoing answer & made oath in due form of law that the matters contained in said answer are true.

ABNER T. HOOD, *J. P.*

52 COMPLAINANTS' EXHIBIT No. 3.

In Chancery. No. 500.

MIDDLETON & AL.

vs.

BERRY & AL.

This cause standing ready for hearing the proceedings were read & considered. It is thereupon this 3d day of October 1865, ordered, adjudged and decreed that the real estate in the proceedings mentioned, being Metropolis View with the appurtenances, be sold; that John A. Middleton & Thomas W. Berry be and they are hereby appointed Trustees to make such sale & that the course & manner of their proceeding shall be as follows: They shall first file with the Clerk of this Court their bond to the United States of America in the sum of One hundred & fifty thousand dollars with a surety or sureties to be approved by a Judge of this Court & conditioned for the performance of the trust reposed in them by this Decree or which may be reposed in them by any future order or decree in the premises; they shall then proceed to make sale of said real estate, at public auction, being given at least three weeks' previous notice of the time, place and terms of sale by advertisement published in the National Intelligencer and such other notice as they may think proper, which terms of sale shall be as follows: One fourth the purchase money shall be paid in cash and the balance in three equal instalments

payable at six, twelve and eighteen months from the day of sale, said deferred payments to bear interest from the day of sale and to be secured by the notes of the purchaser endorsed to the satisfaction of the Trustees.

53 And the said Trustees are hereby authorized & empowered in their discretion to divide into parcels the said real estate and to make sale of said real estate so divided instead of as a whole if in their judgment best for the interest of all parties concerned in said sale. And as soon as convenient after every such sale or sales, the said Trustees shall return to this Court a full & particular account thereof with an affidavit of the truth thereof & of the fairness of such sale or sales, annexed. And on the final ratification of such sale or sales & on payment of the whole purchase money & not before the said Trustees by a good & sufficient deed to be executed & acknowledged agreeably to law shall convey to the purchaser or purchasers in fee simple the property to him, her or them sold free clear & discharged from all claim of the parties to this cause or any person or persons claiming by from or under them.

By order of the Court.

Endorsed: 500 Chy. Middleton & *al.* v. Berry & *al.* Decree for sale of Metropolis View—App'g Jno. R. Middleton & Thos. Berry Trustees. Filed Oct. 3, 1865, R. J. M., Cl'k. Recorded Eq. M. 1 p. 485.

54 In the Matter of the Estate of WASHINGTON BERRY, Deceased.

To the Honl. the Supreme Court of the District of Columbia, sitting in Equity:

The Petitions of E. Dorsey Johnson and Mary E. L. his wife and John B. N. Berry and Rosalie E. Berry, his wife, respectfully sheweth that by decree of your Honorable Court passed on the — day of —, 1865, which is made part hereof, John A. Middleton and Thomas W. Berry were appointed trustees to sell certain real estate called Metropolis View, lying in Washington County and District of Columbia, that your Petitioners are entitled each to a fifth part of said estate in right of your petitioners Mary E. L. Johnson and Rosalie E. Berry who were children of said Washington Berry deceased. Your Petitioners further show that they have families and children to support and are in need of the money which would be coming to them in case of a sale of said real estate as decreed to be sold by this Honorable Court, that the same is in their opinion in a neglected and uncultivated condition, except a very small part, and your Petitioners aver that this is as favorable a season to sell the same as any future time would be, but in any event they are advised and charge that they are entitled to have the same sold forthwith; or at least to have their undivided interests separately ascertained and allotted to them by a commission to be issued out of this Honorable Court, so that they can control their own property and dispose of it as they please.

55 Your Petitioners further show that said decree was passed in 1865 and said trustees have only sold a small part of said estate not exceeding thirty six (36) acres, and they decline

to sell the residue because as they allege it will produce more money if sold at some future time, and therefore they refuse to sell the same unless a majority of the parties entitled will request them to do so. All of which your Petitioners are advised and charged are in contravention of their just rights in the premises.

Wherefore your Petitioners pray that the said trustees may be ordered to show cause why they do not sell said real estate and in the event of your Honorable Court refusing a peremptory order of sale as herein is prayed for, then your Petitioners pray that a commission may be issued to divide said "Metropolis View" estate among the parties interested.

BRENT & PHILLIPS,
For Petitioners.

STATE OF MARYLAND, *Baltimore City*:

Before the subscriber a Justice of the Peace in and for said city, personally appeared this 22nd day of April 1868, E. Dorsey Johnson and John B. N. Berry, two of the above petitioners and made oath on the Holy Evangelical of Almighty God that the facts stated in the above petition are true to the best of their knowledge and belief.

WM. H. BAYZAND, *J. P.*

5 ct. Int. Rev. Stamp.

56 STATE OF MARYLAND, *Baltimore City, set*:

I hereby certify that William H. Bayzand, Esquire before whom the annexed affidavits were made, and who has thereto subscribed his name, was, at the time of so doing, a Justice of the Peace of the State of Maryland, in and for the City of Baltimore, duly commissioned and sworn.

In testimony whereof, I hereto set my hand and affix the *seal* of the Superior Court of Baltimore City, this 22nd day of April, A. D. 1868.

[SEAL.]

GEO. ROBINSON,
Clerk of the Superior Court of Baltimore City.

BALTIMORE, *April 22, 1868.*

To John J. Middleton and Thomas W. Berry (trustees):

GENTLEMEN: Please take notice that on Saturday next the 23rd May 1868, at ten o'clock a. m. we shall present the above Petition to the Supreme Court of the District of Columbia setting in Equity for its action.

Yrs. truly,

BRENT & PHILLIPS,
For Petitioners.

Service of the above Petition and notice acknowledged this 24, April 1868.

THOS. W. BERRY, *Trustee.*

57 Endorsed: 500—Equity. E. Dorsey Johnson & M. E. Berry *et al. vs.* Berry & Middleton, trustees. Petition of E. D. Johnson and others for sale or partition. Filed May 2, 1868, R. J. Meigs, Clerk.

JNO. A. MIDDLETON ET AL.

v.

ELIZA T. BERRY ET AL.

On consideration of the Petition of E. Dorsey Johnson & others & the answer of the trustees thereto, it seems to the Court that the prayer of said Petitioners as respects a sale is reasonable & ought to be granted, it is thereupon this 2 May 1868, ordered that the said trustees proceed to advertise & sell the residue of the property mentioned in said decree & on the terms therein stated & report all sales made by them.

A. B. OLIN, *Justice.*

58 Endorsed: Supreme Court of the District of Columbia. No. 500, Equity Docket 7. Middleton *v.* Berry. Order trustees to sell balance of property, &c. Eq. M. 3, p. 228. Filed May 2, 1868. R. J. Meigs, Clerk.

Supreme Court of the District of Columbia.

No. 500. In Chancery.

JOHN A. MIDDLETON & AL.

v.

ELIZA T. BERRY & AL.

The order passed in the above entitled cause on the 27th of June 1868, confirming the sales made by John A. Middleton and Thomas W. Berry unless cause to the contrary should be shown on or before the Third Tuesday of July, having been published as therein directed as appears by the certificate of publication this day filed and no cause to the contrary having been shown It is thereupon this 12th of October 1868 ordered that the said sales be and they are hereby finally and absolutely ratified and confirmed.

And it is further ordered that said cause be and the same is hereby referred to the Auditor of this Court with directions to state
59 the account of said Trustees with the Trust fund all making proper allowances to said Trustees and the balance for distribution with which said Trustees are chargeable & the order in which distribution shall be made.

By the Court.

Endorsed: 500, Eq. Doc. 7. Middleton *et al. v.* Berry *et al.* Order finally ratifying Trustees' Sale and Reference to Auditor. E. M. 3, p. 397. Filed Oct. 12, 1868, R. J. Meigs, Clerk.

OFFICE OF THE NATIONAL INTELLIGENCER,
WASHINGTON, Sept. 4, 1868.

We hereby certify that the advertisement, of which the annexed is a copy, was published in the National Intelligencer weekly for two weeks, commencing on the 29th day of June 1868.

J. R. SYLVESTER,
For Proprietor.

60 Supreme Court of the District of Columbia.

No. 500. In Chancery.

JOHN A. MIDDLETON ET AL.

vs.

ELIZA T. BERRY ET AL.

Ordered this 27th day of June, 1868, that the sales made and reported by John A. Middleton and Thomas W. Berry, trustees for the sale of the real estate of Washington Berry, deceased, be ratified and confirmed unless cause to the contrary be shown on or before the third Tuesday of July next; Provided, a copy of this order be inserted in the National Intelligencer once a week for two successive weeks before said day. The report states the amount of sales to be \$100,208.59.

(Signed)

A. B. OLIN.

A true copy.

R. J. MEIGS, *Clerk.*

Eq. No. 500, Docket 7.

JOHN A. MIDDLETON ET AL.

vs.

ELIZA T. BERRY ET AL.

On the petition of John A. Middleton filed in the above-entitled cause It is this 31st day of December, 1869 ordered that the said John A. Middleton surviving trustee be and he is hereby authorized and empowered to complete the execution of the trusts of the Decree rendered in said cause by the execution acknowledgment and delivery of all conveyances which purchasers or their assignees may be entitled to demand and receive under the terms of the sales heretofore made by said Middleton and his deceased co-trustee Thomas W. Berry, and that the conveyances so executed acknowledged and delivered by the surviving trustee Middleton shall have the
61 same force and effect as if made by said Middleton and Berry,
co-trustees.

By the Court.

Endorsed: 500, Eq. Doc. 7. Middleton *et al.* vs. Berry *et al.*
Order of Court on Petition of John A. Middleton. M. 4, p. 386.
Filed Dec. 31, 1869. R. J. Meigs, Clerk.

Last Will and Testament of Washington Berry, Who Died October 4th, 1856.

"In the name of God Amen.

I, Washington Berry of Washington County of the District of Columbia being in perfect of body and of sound and disposing mind memory and understanding considering the certainty of death and the uncertainty of the time thereof and being desirous to settle my worldly affairs and thereby be the better prepared to leave this world when it shall please God to call me hence do therefore make and publish this my last will and testament in manner and form following that is to say.

First,—and principally I commit my Soul unto the hands of Almighty God who gave it and my body to the earth to be decently buried at the discretion of my executors and after my debts and funeral expences have been paid I give devise and bequeath as follows:

Item 1st. I give devise and bequeath to my son Washington L. Berry his heirs and assigns all the lands together with all their hereditaments and appurtenances of which I may die seized and possessed situated in Washington County Maryland called and known by the name of Long Meadows or Spriggs Paradise or by any and whatsoever other name any part of the said lands in the said County may be known or called containing 570 acres and 32 perches according to the deed from George I. Harry to me, provided the said Washington L. Berry and his heirs shall before this
63 devise shall take effect and before he and they shall enter possession of the said lands execute acknowledge and deliver a deed of bargain and sale release and confirmation to my daughters jointly to their heirs or assigns of the estate of one half of Bell View on the Potomac River which was devised to him the said Washington L. Berry by his Grand Father Zachariah Berry and if the said Washington L. Berry and his heirs shall refuse to execute the said deed or neglect and delay the same for the space of two years then this devise not to take effect and the lands heretofore given shall go to and be divided among my daughters living share and share alike.

Item 2nd. I give devise and bequeath to my son Zachariah Berry his heirs and assigns the lands and estates called Bell Mont purchased of Richard C. Bowie and containing Two hundred and ninety acres *long* in Prince Georges County State of Maryland and also and adjoining tract purchased of Edmund B. Duval called Releys discovery containing one hundred nineteen containing *fore* hundred and nine 409—in *bouth* tracts. Provided the said Zachariah Berry and his heirs shall before the devise shall take effect and before he and they shall enter into possession of the said lands execute acknowledge and deliver a deed of bargain and sale release and confirmation to my daughters jointly to their heirs and assigns of the

estate one half called Bell View on the Potomac River which was devised to to him the said Zachariah Berry by his Grand Father Zachariah Berry and if the said Zachariah Berry and his heirs shall refuse to execute the said deed and neglect or delay the same
 64 for the space of two years then this device not to take effect and the lands hereinbefore given shall go to and be divided among my daughters living at my death share and share alike.

Item 3rd. I give devise and bequeath to my son Thomas W. Berry his heirs and assigns my farm called Blue Planes containing five hundred acres including Addison's Good Will all of which I purchased of John Marbury and also one hundred and thirty one acres I purchased of Charles B. Hambleton all of which lands lies on the Potomac in the District of Columbia and partly in Prince Georges County State of Maryland.

Item. Although I have in the devise hereinbefore made to my three sons Washington L., Zachariah and Thomas W. Berry used words of improtance yet I do hereby expressly annex to the several estates so given to them this limetation that if either of them shall die without leaving lawful issue that the estate of each one or both if more than one shall go to the survivors and survivor his and there heirs.

Item 4th. I give devise and beque-th to my dear wife Eliza T. Berry if she should survive me for and during her natural life the Homestead estate on which I now reside called Metropolis View, contain'g fore hundred and ten acres also all my stocks in the Corporation of the City of Washington also all my stocks in the debt of the State of Maryland, also all and whatsoever other stocks I may have at my death in any state or corporation and all rents and all the money I may then have on hand or which may be due me on bond, bill or notes or otherwise, subject nevertheless the whole and every part of the said bequest to my said wife in the first place to the proper and comfortable maintenance and education &
 65 support according to their condition and prospects of my five daughters Anna Maria, Eliza Thomas, Amelia Owen, Mary Elizabeth Louisa and Rosalie Eugenia Berry so long as they, and each of them remain single and unmarried and upon their marriage and birth of issue of each and every of them respectively to pay and deliver to such one or more so married and having issue her just, full and equal sixth part of the personal estate so as aforesaid given to my said wife.

Item 5th. It is my will and devise that my said homestead shall be kept and continued as the home and residence of my daughters so long as they shall remain single and unmarried. I therefore first after the death of my wife will and devise the said estate to my said daughters being single and unmarried and to the survivors and survivor of them so long as they shall be and remain single and unmarried and on the death or marriage of the last of them then I direct that the said estate shall be sold by my executors and the proceeds thereof be distributed by my said executors among my daughters living at my death and their children and descendants (*per stirpes*) and I hereby reserve to my heirs the family va-lt and

burial ground embracing half and acre of ground and having the said vault as a centre and on such sale as aforesaid by my executors I earnestly enjoin on my sons or some of there sons to purchase the said homeste-d that it may be kept in the family.

Item 6th. I direct that my executors shall divide and dis-
66 tribute all the rest residue and remainder of my personal estate among my children at my death and the descendants of such as may have died during my life to take a parent's part.

Item 7th. If any one or more of my devisees or legatees hereinbefore named shall institute any action at law or in chancery to set aside this my solemn and deliberate disposition of my property, I hearby revoke and make void every devise and bequest to such person or persons or through or by means of which they would otherwise derive any benefit or advantage hereinbefore made and I give to such person and persons each and every of them the sum of one hundred dollars to be paid to him her or them by my executors in full of all the interest claim or demand which he she or they might otherwise have upon any part of my estate by reason of any matter or thing hereinbefore contained so of his her or there being entitled as heir or heirs distributor or distributors to any part thereof. And I will and devise beque-th and direct that the interest or estate which shall or may have been given heretofore to such person or persons so contesting the validity of this will or any part thereof or which he she or they may or might otherwise deem by reason of any matter or thing hereinbefore contained shall fall into the general residue of my estate and be divided and distributed among my heirs and distributees excluding therefrom him her or them who shall have instituted such suit or action.

Finely I appoint Eliza T. Berry my wife and my son W. L. Berry my executor- of this my last will and testament and Trustees of my estate.

67 In testamony whereof I have hearinto set my hand and seal this twenty-eighth day of July in the year of our Lord eighteen hundred and fifty two 1852.

WASHINGTON BERRY. [SEAL.]

Sealed signed and delivered and published by Washington Berry in our presence being his last will and testament who herein sign our names as witnesses—our hands and seals.

JOHN R. MITCHELL.	[SEAL.]
WM. S. MITCHELL.	[SEAL.]
E. BARTON GRUNWELL.	[SEAL.]

68

Order of Publication.

Filed July 8, 1907.

In the Supreme Court of the District of Columbia.

In Equity. No. 27071.

H. P. SANDERS, Complainant,

vs.

ALEXANDER D. JOHNSON ET AL., Defendants.

The object of this suit is to remove cloud from complainant's title to Lots Five (5), Six (6), Seven (7), Eighteen (18) and Nineteen (19), in the subdivision of a tract of land known as Metropolis View, made by John A. Middleton and Thomas W. Berry, Trustees, more particularly described in complainant's bill.

On motion of the complainant, it is this 8th day of July A. D. 1907, ordered that the defendants, Washington L. Berry, Tiernan B. Berry, William F. Berry, Thomas C. Berry, Maria Hughes Kennedy, Adelaide Savage Mealey, Lillie C. Bowie, Henry A. Berry, Edward L. Berry and Martha A. Berry, cause their appearance to be entered herein, on or before the fortieth day, exclusive of Sundays and legal holidays, occurring after the day of the first publication of this order; otherwise the case will be proceeded with as in case of default.

Let the above order be published once a week, for three successive weeks, in the Washington Law Reporter, and the Evening Star newspaper.

By the Court:—

WRIGHT.

69

Decree Pro Confesso.

Filed October 7, 1907.

In the Supreme Court of the District of Columbia.

No. 27071. In Equity.

HENRY P. SANDERS, Complainant,

vs.

ALEXANDER D. JOHNSON ET AL., Defendants.

Due publication of the order passed in this cause on the 8th day of July, 1907, having been made, and the defendants in said cause, Washington L. Berry, Tiernan B. Berry, William F. Berry, Thomas C. Berry, Maria Hughes Kennedy, Adelaide Savage Mealey, Lillie C. Bowie, Henry A. Berry, Edward L. Berry, and Martha A. Berry, not having entered their appearance herein, it is this 7th day of

October, A. D. 1907, ordered that the bill of complaint be, and the same hereby is, taken for confessed as to said defendants.

ASHLEY M. GOULD, *Justice*.

Proof of Publication.

Filed October 7, 1907.

In the Supreme Court of the District of Columbia this 2 day of August, 1907.

Equity. No. 27071, Docket No. —.

H. P. SANDERS

vs.

ALEXANDER D. JOHNSON ET AL.

Affidavit.

DISTRICT OF COLUMBIA, *To wit:*

Personally appeared before me, a Notary Public in and for the said District, M. W. Moore, well known to me to be the Manager of "The Washington Law Reporter," a weekly newspaper printed and published in the City of Washington and District aforesaid, and made oath in due form of law that the annexed notice was published in said weekly newspaper at the times mentioned in the Certificate opposite hereto.

Witness my hand and official seal this 2 day of August 1907.

[NOTARIAL SEAL.]

ALFRED D. SMITH,
Notary Public, D. C.

Copy of Notice.

B. F. Leighton, Solicitor.

In the Supreme Court of the District of Columbia.

In Equity. No. 27071.

H. P. SANDERS, Complainant,

vs.

ALEXANDER D. JOHNSON ET AL., Defendants.

The object of this suit is to remove cloud from complainant's title to lots five (5), six (6), seven (7), eighteen (18), and nineteen (19), in the subdivision of a tract of land known as Metropolis View, made by John A. Middleton and Thomas W. Berry, trustees, more particularly described in complainant's bill. On motion of the complainant, it is this 8th day of July, A. D. 1907, ordered that the defendants, Washington L. Berry, Tiernan B. Berry, William F.

Berry, Thomas C. Berry, Maria Hughes Kennedy, Adelaide Savage Mealey, Lillie C. Bowie, Henry A. Berry, Edward L. Berry, and Martha A. Berry, cause their appearance to be entered herein, on or before the fortieth day, exclusive of Sundays and legal holidays, occurring after the day of the first publication of this order; otherwise the case will be proceeded with as in case of default.

By the Court:

[SEAL.]

WRIGHT.

A true copy.

Test:

J. R. YOUNG, *Clerk*,
By F. W. SMITH,
Ass't Clerk.
28-3t.

72 I hereby certify that the foregoing Legal Notice was printed and published in the regular issues of "The Washington Law Reporter," a weekly newspaper, bearing date July 12-19-26-1907.

M. W. MOORE,
Gen. Manager of The Law Reporter Co.
of Washington City.

Proof of Publication.

Filed October 7, 1907.

CITY OF WASHINGTON, *District of Columbia*, ss:

Personally appeared before me, Cornelius Eckhardt, a Notary Public in and for the City and District aforesaid, J. Whit Herron, who, being duly sworn according to law, on oath says that he is the Agent and Business Manager of The Evening Star, a daily newspaper Published in this City of Washington, District of Columbia, and that the advertisement, of which the annexed is a true copy, was published in said newspaper three times, on the following dates: July 9, 16 & 23, 1907 at a cost of Six and 90/100 (\$6.90) Dollars.

J. WHIT. HERRON.

Sworn to and subscribed before me this twenty-fourth day of July, A. D. one thousand nine hundred and seven.

[NOTARIAL SEAL.]

CORNELIUS ECKHARDT,
Notary Public.

73 In the Supreme Court of the District of Columbia.

In Equity. No. 27071.

H. P. SANDERS, Complainant,

vs.

ALEXANDER D. JOHNSON ET AL., Defendants.

The object of this suit is to remove cloud from complainant's title to lots five (5), six (6), seven (7), eighteen (18) and nineteen (19), in the subdivision of a tract of land known as Metropolis View, made by John A. Middleton and Thomas W. Berry, trustees, more particularly described in complainant's bill. On motion of the complainant, it is this 8th day of July, A. D. 1907, ordered that the defendants, Washington L. Berry, Tiernan B. Berry, William F. Berry, Thomas C. Berry, Maria Hughes Kennedy, Adelaide Savage Mealey, Lillie C. Bowie, Henry A. Berry, Edward L. Berry, and Martha A. Berry, cause their appearance to be entered herein, on or before the fortieth day, exclusive of Sundays and legal holidays, occurring after the day of the first publication of this order; otherwise the case will be proceeded with as in case of default.

By the Court:

[SEAL.]

WRIGHT.

A true copy.

Test:

J. R. YOUNG, *Clerk*,

By F. W. SMITH, *Ass't Clerk*.

jy 9-law. 3w.

74 *Affidavit as to Mailing Copies of Order of Publication.*

Filed October 7, 1907.

In the Supreme Court of the District of Columbia.

No. 27071. In Equity.

HENRY P. SANDERS, Complainant,

vs.

ALEXANDER D. JOHNSON ET AL., Defendants.

DISTRICT OF COLUMBIA, ss:

Benjamin F. Leighton, being first duly sworn according to law, deposes and says that he is a citizen of the United States and a resident of the District of Columbia, a member of the Bar of this Court and the solicitor for the complainant in this cause; that on the 16th day of July, 1907, he mailed, postpaid, directed to their last known places of address, a copy of the order of publication passed in this cause on July 8th, 1907, as published in the Washington Law Re-

porter and the Evening Star, to the following named defendants: Washington L. Berry, Tiernan B. Berry, William F. Berry, Thomas C. Berry, Maria Hughes Kennedy, Adelaide Savage Mealey, Lillie C. Bowie, Henry A. Berry, Edward L. Berry, and Martha A. Berry.

Further affiant saith not.

BENJ. F. LEIGHTON.

Subscribed and sworn to before me this 7th day of October, A. D. 1907.

J. R. YOUNG, *Clk.*,
By F. E. CUNNINGHAM, *Ass't Clk.*

75 *Joint and Several Answer of the First Fourteen Defendants.*

Filed November 12, 1907.

In the Supreme Court of the District of Columbia.

No. 27071. Equity.

HENRY P. SANDERS, Complainant,

vs.

ALEXANDER D. JOHNSON ET AL., Defendants.

Joint and several answer of the defendants, Alexander D. Johnson, Elise Thomas Berry, Louise Y. B. Duvall, Imogene Berry Tubman, Eugene Benton Berry, John H. Berry, Claude Nathaniel Berry, Leila T. Berry, Frederick B. Berry, Albert L. Berry, John A. Middleton, David L. Middleton, Washington B. Middleton and Thomas W. B. Middleton, to the bill of complaint of the above named complainant.

For answer to said bill of complaint these defendants say:

1. They admit that the complainant is a citizen of the United States and a resident of the District of Columbia, and brings this suit in his own right. They deny that the title to the real estate described in said bill is vested in the complainant in fee simple, or otherwise, and they deny that the claims and pretensions of these defendants set forth in suit in equity in this court No. 26,464, are unfounded or invalid.

2. They admit the averments of the second paragraph of
76 said bill of complaint as to the residence of all the defendants in this case, and they admit that all the defendants are over twenty-one years of age.

3. These defendants deny that the complainant is seized in his demesne as of fee in the lots and parcels of land described in the third paragraph of the bill of complaint, or any of them, and they aver on the contrary that these defendants are the legal or equitable owners in fee of all of said real estate, and that if the complainant has any interest at all therein, which these defendants do not admit, it is a naked legal title. They admit that a deed from Lydia M. Ed-

monds to the complainant was made as averred in the third paragraph of said bill of complaint; and that said deed was duly recorded and delivered to the grantee, as averred in said paragraph. They admit that the land described in said deed is part of a larger tract of land in the District of Columbia, heretofore generally known as Metropolis View; that that tract contained about four hundred and ten acres of land; that at the time of the death of Washington Berry in the year 1856 said tract known as Metropolis View was owned in fee simple by said Washington Berry, and was occupied by him as a home, and had been so owned and occupied by him for a long time prior to the year 1856, and before July 28th, 1852, the date of the last will and testament of said Washington Berry, hereinafter referred to; that at the date of said will said Washington Berry had five daughters, all of whom are named in said will and all of whom at the date of said will were unmarried, and all of

77 whom, except Anna Maria, were unmarried when said Washington Berry died; and that although said Anna Maria was married at the time of the death of said Washington Berry she had not then had born unto her any child. In other words, these defendants admit that when Washington Berry died he had no grandchildren born to him by any of his daughters.

4. These defendants are advised that the averments of paragraph four of said bill of complaint as to the proceedings in equity cause No. 500 in this court are substantially correct. But as there is annexed to said bill of complaint as a part thereof an exhibit which is a correct copy of all the material papers and entries in said equity cause No. 500, these defendants prefer to refer to the same as showing fully and completely all that is material to be known in this case as to the proceedings in that case.

These defendants in this connection aver that their respective parentage and their respective dates of birth are as follows:—

Children of Anna Maria Berry, and her husband, John A. Middleton:

John A. Middleton, Born February 12, 1857.

David L. Middleton, born November 4th, 1867.

Washington B. Middleton, born November 4, 1867.

Thomas W. B. Middleton, born October 6, 1870.

Children of Amelia Owen Berry, and her husband Allen Lucien Berry:

Leila Thomas Berry, born June 30th, 1861.

Albert L. Berry, born February 13th, 1863.

78 Frederick B. Berry, born January 19th, 1876.

Child of Mary E. Berry, and her husband, E. Dorsey

Johnson:

Alexander D. Johnson, born June 23rd, 1867.

Children of Rosalie E. Berry, and her husband, John B. N. Berry:

John H. Berry, born October 14th, 1866.

Elise Thomas Berry, born November 26, 1868.

Louise Y. B. Duvall, born November 9, 1870.

Imogene Berry Tubman, born August 21st, 1873.

Eugene Benton Berry, born January 20th, 1876.

Claude Nathaniel Berry, born March 1st, 1878.

These defendants aver that the bill of complaint in said Equity cause No. 500 was filed in this court on the 28th day of August, 1865; that on that date the defendants, John A. Middleton, Leila Thomas Berry and Albert L. Berry, were living, and they further aver that the defendants were born before the sale of lots in said Metropolis View by the Trustees appointed in said Equity cause No. 500 was completed.

These defendants are advised and aver that since none of these defendants who were born before said equity proceeding No. 500 was instituted were made parties thereto, and since these defendants born and unborn at that time were not in any wise represented in the proceedings in said Equity cause No. 500, neither the decree made in said last mentioned cause, nor any sale made in pursuance of said decree, is of any effect as against these defendants or any of them.

79 These defendants admit that said Metropolis View was subdivided by the Trustees appointed in said equity cause No. 500, and that all the lots in said subdivision were sold by said Trustees, as averred in the fourth paragraph of the bill of complaint in this case, and that the proceeds after deducting proper expenses were paid to the said five daughters of said Washington Berry.

5. Answering the averments of the fifth paragraph of the bill of complaint, these defendants are advised that they are wholly immaterial in this case, inasmuch as whether they are true or not the rights of these defendants must be determined by the true construction of the will of Washington Berry, which is not, and cannot be affected by any of the matters referred to in said paragraph. These defendants therefore as to said paragraph will claim the same advantage at the final hearing of this case as if they had specially demurred thereto. Answering, however, the averments of said paragraph five, these defendants on information and belief admit the averments thereof relating to the subdivision of said Metropolis View and the sales made of separate parcels therein. Whether the intermediate transactions and conveyances affecting said transactions are numbered by the thousands, these defendants have no means of determining, and if the averment of the bill of complaint in that regard is deemed to be material, these defendants call for strict proof thereof.

On information and belief these defendants deny that since the lots in said subdivision were sold in said equity proceeding
80 No. 500, the titles based upon such sales have been passed and approved without a question by all lawyers and title companies engaged in examining and passing titles.

As to the remaining averments of paragraph five, these defendants have no knowledge or information, except what is contained in the averments of said paragraph, but for the purposes of this case, and for no other purpose whatsoever, they are willing to, and hereby do, admit that they are true.

6. These defendants admit that the averments of the sixth para-

graph of said bill of complaint relating to the proceedings in Equity cause No. 26,464 in this court are substantially correct.

7. As to the averments of the seventh paragraph of the bill of complaint in this case, these defendants are advised and aver that upon the proper interpretation of said will of said Washington Berry, they are the legal or equitable owners in fee of the real estate which in the third paragraph of the bill of complaint in this case the complainant claims to own; and that the proceedings in said equity cause No. 500, and the conveyance made by the Trustees in said cause did not and do not in any wise affect the said title and ownership of these defendants in said land. These defendants admit that the complainant, and those under whom he claims by title derived mediately or immediately from the Trustees appointed in said Equity cause No. 500, has been in actual, open, and notorious possession of said last mentioned real estate for more than twenty

81 years, and for probably thirty-five years. They admit that if the complainant has any interest in said real estate under the will of said Washington Berry that such possession has been adverse as to them, but being otherwise advised, they aver that such possession was not in fact adverse as to them until May, 1903, because while they have a legal or equitable interest in fee simple in said lands under said will, they had no right of entry as to said real estate until May, 1903, when said Eliza T. Berry, the last survivor of said five daughters of said Washington Berry died, never having been married. They admit that they did not themselves assert any interest or title in or to any part of said Metropolis View until after the death of Eliza Thomas Berry, which occurred in the month of May, 1903. They aver that said Eliza Thomas Berry was the last surviving daughter of said Washington Berry, and that she never married.

They admit that as the children of the other four daughters of said Washington Berry they claim, and have asserted and intend to assert, that they are the legal or equitable owners in fee of the land which in their bill of complaint in this cause the complainant claims to own, and to the whole of Metropolis View. They admit that their claim thus made, and as asserted in said Equity cause No. 26,464, constitutes a cloud upon the title of the complainant to the said land (if the complainant has any such title, which these defendants deny), and that the complainant is thereby prevented from disposing of the property by sale or by incumbrance, and that examiners of title are prevented from passing the title of said property without mentioning said cause. They admit that the value

82 of the land described in paragraph three of the bill of complaint in this case is over \$5,000. And they further aver that the only reason that the trustees appointed in said case in Equity No. 26,464, did not proceed at once after their appointment to sell said tract called Metropolis View was that several of the persons claiming parts of said tract adversely to these defendants were, and for a long time continued to be. engaged in person, or through their respective counsel, in negotiation with the counsel for these defendants looking to the bringing of a test suit or suits to decide once and

for all, and with as little expense and delay as possible, the proper construction of that paragraph of the will of said Washington Berry under which these defendants claim title to the said Metropolis View.

8. These defendants being so advised, again deny that the effect of said will of said Washington Berry was to vest in his daughters the absolute interest in the proceeds of sale of the land included in Metropolis View, and deny that said daughters or any of them had the right to have advanced the time for selling and distributing the proceeds under the terms of the will of Washington Berry. They are further advised, and deny that the decided cases mentioned or referred to in the eighth paragraph of said bill of complaint establish beyond question or otherwise the validity of any of the titles derived through or from the aforesaid equity cause No. 500.

These defendants admit that if the contention of the complainant in this case as to the proper construction of said paragraph of said will is correct, he is without any adequate remedy at law, and is entitled to the relief which he seeks.

And having fully answered these defendants pray to be hence dismissed with their reasonable costs in this behalf most unjustly incurred.

ALEXANDER D. JOHNSON,
ELISE THOMAS BERRY,
LOUISE Y. B. DUVAL,
IMOGENE BERRY TUBMAN,
EUGENE BENTON BERRY,
JOHN H. BERRY,
CLAUDE NATHANIEL BERRY,
LEILA T. BERRY,
FREDERICK B. BERRY,
ALBERT L. BERRY,
JOHN A. MIDDLETON,
DAVID L. MIDDLETON,
WASHINGTON B. MIDDLETON,
THOMAS W. B. MIDDLETON,

By A. S. WORTHINGTON,

Their Attorney.

A. S. WORTHINGTON,

Solicitor for Defendants Named in Foregoing Answer.

84

Replication.

Filed November 12, 1907.

In the Supreme Court of the District of Columbia.

No. 27071. In Equity.

HENRY P. SANDERS, Complainant,

vs.

ALEXANDER D. JOHNSON ET AL., Defendants.

The complainant hereby joins issue with the defendants Alexander D. Johnson, Elise Thomas Berry, Louise Y. B. Duvall, Imo-

gene Berry Tubman, Eugene Benton Berry, John H. Berry, Claude Nathaniel Berry, Leila T. Berry, Frederick B. Berry, Albert L. Berry, John A. Middleton, David L. Middleton, Washington B. Middleton and Thomas W. B. Middleton.

B. F. LEIGHTON,
Solicitor for Complainant.

85

Testimony on Behalf of Complainant.

Filed December 4, 1907.

In the Supreme Court of the District of Columbia.

In Equity. No. 27071.

HENRY P. SANDERS

vs.

ALEXANDER D. JOHNSON ET AL.

WASHINGTON, D. C., November 22, 1907—2:30 o'clock p. m.

Met pursuant to agreement at the office of B. F. Leighton, Columbian Building, Washington, D. C.

Present on behalf of the complainant, Mr. Leighton.

Present on behalf of the defendants, Mr. Worthington.

MR. LEIGHTON: I offer in evidence all of the exhibits attached to the bill of complaint, and all of the papers and proceedings of every kind following the bill and attached to it, as follows:

1. A deed dated December 15, 1905, from Lydia M. Edmonds to Henry P. Sanders, recorded May 15, 1906, in Liber No. 2957, Folio 1, *et seq.*

2. A copy of the bill in equity cause No. 500 in The Supreme Court of the District of Columbia, of John A. Middleton *et al. vs.* Eliza Thomas Berry *et al.*

3. A copy of the last will and testament of Washington Berry.

4. The answer of Eliza Thomas Berry, in equity cause No. 500 in the Supreme Court of the District of Columbia.

5. The order of September 19th, 1864, in Chancery cause No. 500 in the Supreme Court of the District of Columbia.

6. The report of William Redin, the auditor, in equity cause No. 500, in the Supreme Court of the District of Columbia.

7. The deposition of John A. Middleton and Erasmus I. Middleton, in the same cause.

8. The answer of Washington L. Berry and Adelaide Berry, his wife, in the same cause.

9. The answer of Rosalie Eugenia Berry.

10. The answer of John B. N. Berry, in the same cause.

11. The answer of Thomas W. Berry.

12. The answer of Zachariah Berry, of W. and Elizabeth C. Berry, his wife, in the same cause.

13. The decree of October 3, 1865, in equity cause No. 500.

14. The petition of E. Dorsey Johnson and Mary E. L., his wife, and John B. N. Berry and Rosalie E. Berry, his wife, in the same cause.

15. The order of May 2, 1868 on that petition, directing the trustee to sell the residue of the property mentioned in the original decree.

16. The order of October 12, 1868, confirming sales made by John A. Middleton and Thomas W. Berry.

87 17. The certificate of J. R. Sylvester of publication of advertisement in the National Intelligencer.

18. The order of December 31, 1869 authorizing John A. Middleton, surviving trustee, to complete the execution of the trusts of the original decree.

It is agreed that the foregoing papers contain all the proceedings in said Equity cause No. 500, so far as they are pertinent or material in this cause; and that none of the children of any of the daughters of said Washington Berry were made parties to said proceedings or were in any wise represented in said cause, unless the proceedings hereinabove put in evidence constitute, in legal effect a representation of them.

JOHN D. COUGHLIN, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined

By Mr. LEIGHTON:

Q. State your full name, your residence and occupation? A. My name is John D. Coughlin. I am Vice-President of the Columbia Title Insurance Company.

Q. Since when? A. Since 1902.

Q. Is that the date of the organization of the company? A. It is the date of the joint arrangement between the Real Estate and the Columbia Title Insurance Companies. Prior to that
88 time I was secretary of the Columbia Title Insurance Company.

Q. From what time? A. From its organization in 1887.

Q. What were your duties as such officers? A. As manager—and I also examined titles.

Q. Are you a member of the Bar? A. I am a member of the Bar.

Q. Since when? A. Since 1878.

Q. Have you or not made a specialty of real estate law? A. I do not know that I have specialized very much; but my line of work has been in that direction.

Q. Since you have been a member of the Bar? A. Certainly, since my connection with the company.

Q. State whether or not you are familiar with the tract of land known as Metropolis View, that is described in this bill? A. Yes sir.

Q. You may give, in a general way, its outlines. A. It starts at the northeast corner of the Bunker Hill road, seven or eight hundred feet, I should say, from University station, running thence to the corner of a tract owned by the Associated Professors of St. Mary's

Seminary and runs westerly along the Bunker Hill road down to Glenwood Cemetery Road, and then southerly along the cemetery road passing Edgewood and on to the north line of the German Cemetery. It then runs southeasterly along the north line of the

89 German Cemetery to the west line of what is now Center Eckington, and then southerly again to the north line of Eckington proper; thence east with the north line of Eckington proper crossing the railroad to the southeast corner of the old Wales Hubbard tract, now owned by the Baltimore & Ohio Railroad; thence northerly, passing between the two tracts of the Harmony Cemetery, to the southeast corner of Dennison's and Reed's subdivision; then eastward to the boundary line of the sub known as South Brookland; thence it follows the outlines of South Brookland and Brookland proper until it crosses the railroad, and then follows the outline of what was known as West Brookland Park, to the beginning.

Q. State whether or not the land embraced within this tract is subdivided generally?

Mr. WORTHINGTON: I object to that as being immaterial to the issues in this cause.

A. It is partially subdivided.

Q. To what extent; what number of lots, approximately, is this tract divided into?

Mr. WORTHINGTON: May it be understood that my objection applies to all questions you may ask of this witness or any other on the question of the subdivision of Metropolis View into lots or parcels.

Mr. LEIGHTON: Yes.

A. There is a subdivision of Edgewood, containing about eight blocks; one of center Eckington, containing I think about eight blocks; one of Dennison and Reed's subdivision that contains about sixty lots; one of the Maguire tract which is partially subdivided; and a number of lots that are not subdivided have been sold off from the tract. In all I should say there were about seven hundred parcels, probably.

Q. What is the usual size of those lots in the subdivisions that have been made? A. The subdivisions have been made into about ordinary building lots of twenty-five by the depth of one hundred or one hundred and twenty to one hundred and fifty feet, and possibly sometimes with a wider front.

Q. Are there any large holdings still remaining in the area mentioned? A. Quite a number. There is the Sanders property, just north of Edgewood, and the Stewart lots. The Saint Vincent Orphan Asylum has quite a holding.

Q. How much has it? A. I do not know; but possibly 25 or 30 acres, I should take it.

Q. Is the Asylum itself located on this tract? A. It is located there. There are some buildings along the Bunker Hill road front. There is quite a large stone building erected for some college, I think of a Dominican order.

Q. State whether or not any or what portion of the territory has been built up with private residences?

Mr. WORTHINGTON: I object to any questions relating to the improvements on the Metropolis View tract, outside of the particular tract involved in this suit, as being immaterial.

91 A. I have but little acquaintance with the buildings there other than those I have mentioned, which strike the eye in going by there, or which may have been brought personally to my attention in some way. There are a number of scattered houses which I can see from the train, on the property.

Q. The number of them you do not know? A. I could not tell.

Q. Taking the whole tract together, how many different holdings are there?

Mr. WORTHINGTON: I object to the question on the ground that any interest in that property which the people I represent may have is not to be affected by the number of people claiming adversely to them.

A. From glancing at the assessment books——

Mr. WORTHINGTON: I object to the assessment books being used as evidence, on the ground that it is *res inter alios acta*.

By Mr. LEIGHTON:

Q. You may answer the question. A. I should say about one hundred and seventy-five or thereabouts.

Q. State whether or not you have had occasion, or the Real Estate Title Insurance Company and the Columbia Title Insurance Company has had occasion to examine the title to the property situated within Metropolis View, and derived through the will of Washington Berry, and equity proceeding No. 503 in the Supreme Court of the

92 District of Columbia? A. The Columbia Title Insurance Company has made several examinations in that tract.

Q. Several examinations before the two companies united?

A. Yes.

Q. Have they made any examinations since the companies have been together? A. We have made quite a number since they came together, in 1902.

Q. What do they report as to these titles?

Mr. WORTHINGTON: I object to that on the ground that the rights of the defendants whom I represent in this case are not to be, in the slightest degree, affected by what any lawyer or real estate title company may think, and to any testimony with reference to proceedings in their offices of which my clients had no notice and in which they took no part.

A. We have always passed those titles.

Q. Can you state how many titles have been passed through the Columbia Title Insurance Company since its organization, which have been certified as good?

Mr. WORTHINGTON: Will you agree that my last objection may

apply to all evidence in this line which may be given by this witness or any other?

Mr. LEIGHTON: Certainly.

Mr. WORTHINGTON: Then I will not repeat it.

A. The full examinations, prior to 1902, would possibly number about twenty.

Q. And how many since then? A. Since 1902 there have
93 been probably about the same number, or a little greater number.

Q. Can you state what the company certified in those cases, as to what the result of the examination was? A. They have always certified the title, passing through that equity cause, as a good one.

Q. Do you know that the practice has been with other real estate lawyers who have made examinations of titles a specialty. A. I do not know that I could say of my own knowledge, except from general reputation.

Q. How many title companies are there in the District of Columbia? A. There is the Real Estate Title Company, which was organized in 1881; the Columbia, which was organized in 1887; the Washington, the District, the Lawyers, and I think the Home Title Company.

Q. Those are all the title companies doing business in this city? A. Those are all doing business as to District real estate. I think there are some suburban title companies here with respect to land outside of the District of Columbia; but those are all the title companies that I know of that are really reporting on titles to land in the District of Columbia.

Q. Prior to the organization of these companies, how was the examination touching this class of work made? A. By individual examiners.

Q. Can you give the names of men who were making that a specialty, and who were recognized as authorities on real
94 estate matters? A. William R. Woodard, Isaac L. Johnson, Judson T. Cull, Mahlon Ashford, Milton C. Barnard, and Thomas S. Hopkins. Those are some of the examiners I knew.

Q. Were those you have named the best known members of the Bar who were doing that class of work? A. Yes; as title examiners.

Q. Give the names of such of them as are now living. A. I think that of those I have mentioned only Judson T. Cull and Mr. Hopkins are living. Mr. Hopkins subsequently gave up the title insurance business and went into other matters. I think he is still living. The others are gone.

Q. Can you state what portion of the title business is now being done by the title companies? A. The greater part of it and practically all of it, I think, except that there are some building association lawyers. There are very few other examiners that I see now pursuing their way in the record office.

Q. When was the first question raised as to the validity of this title, derived through this equity proceeding and the will of Washington Berry?

Mr. WORTHINGTON: May we understand that everything of this kind come in subject to my objection?

Mr. LEIGHTON: Certainly.

A. The first intimation I had of it was derived from a visit of Mr. J. B. N. Berry.

95 Q. One of the parties to this suit? A. He is a son-in-law of Washington Berry, as I recall it.

Q. When was that? A. That might have been a few months before this bill was filed.

Q. To what bill do you refer? A. To the bill filed by Mr. Worthington in equity cause No. 26,464.

No Cross Examination.

Subscribed and sworn to before me this — day of — A. D. 1907.

Examiner in Chancery.

THOMAS P. WOODARD, a witness of lawful age called by and on behalf of the complainant, having been first duly sworn, is examined.

By Mr. LEIGHTON:

Q. What is your name and occupation? A. Thomas P. Woodard. I am a lawyer.

Q. Since when? A. Since 1890.

Q. Have you made a specialty of the subject of real estate? A. I have.

96 Q. Ever since you have been at the Bar? A. Yes; with an interim of four years between 1894 and 1898.

Q. Did you know William R. Woodard? A. I did. I studied law in his office for three years, prior to my admission to the Bar.

Q. What was his occupation? A. He was a lawyer.

Q. Did he have any specialty? A. He was a lawyer exclusively engaged in the examination of titles of real estate.

Q. Did he have anything to do with the Washington Real Estate Title Company? A. The Washington Title Insurance Company was organized upon the basis of the records accumulated by Mr. William R. Woodard.

Q. What is your connection now with the title company? A. I am the Vice-President and title officer of the Washington Title Insurance Company and the District Title Insurance Company.

Q. Those two companies are operating together; are they? A. They are and have been since January 1st, 1906.

Q. And do a general title business here in the city? A. Yes sir.

Q. Have you ever had occasion to examine the title to property situated in Metropolis View? A. I have.

97 Q. Coming through the will of Washington Berry, and equity proceedings No. 500 in The Supreme Court of the District of Columbia? A. Yes, sir.

Q. Have your companies had occasion to examine titles coming through those sources? A. We have, from time to time, on numerous occasions.

Q. Say whether or not Mr. Woodard's examinations were directed to county or city property? A. Largely to the county property. He made a specialty of county property.

Q. State what you reported as to those titles, coming through the sources indicated. A. The titles passed by the trustees in equity cause No. 500 were accepted as good. Since I have been engaged in the examinations of titles, the examinations of titles for land embraced in that tract began with the report and ratification of the sale by the trustees in that equity cause.

Q. Can you state approximately how many titles to property situated in Metropolis View have passed through the District Title Company and the Washington Title Company since their organization? A. I cannot tell that with any degree of accuracy.

Q. Do you know what the habit of Mr. Woodard was as to titles coming through those sources? A. He invariably passed them. He made the original examinations soon after the decree and early sales under equity cause No. 500, and that original examination, 98 in which the title was passed as good, was used as the basis for all subsequent examinations.

Q. And your two companies have been operating in that way since then? A. They have operated in the same way.

Q. Did you know William Redin? A. I did not. He died when I was about a year old.

Q. Do you know his reputation? A. Only as I have gathered it from the author's reports and reported cases of our court.

Q. What was he?

Mr. WORTHINGTON: As this is a new line of inquiry, I will now object to any attempt to affect the rights of my clients in this case by evidence as to the reputation of Mr. Redin. I object on the ground that it is wholly immaterial.

A. I only know by general report that he was one of the leaders of the Bar of the court preceding the present Supreme Court of the District of Columbia and was subsequently appointed auditor of the present court. He made a specialty of equity practice.

Q. When did you first hear questioned the validity of these titles derived under the will of Washington Berry and under this equity proceeding No. 500? A. A few days, possibly a week, prior to the time of the filing of a bill, the number of which I do not know, the purpose of which was to appoint trustees in place of the trustees under the will of Washington Berry.

99 Q. Prior to that time what had been your custom and the custom of all real estate lawyers, so far as you know, with respect to passing these titles? A. The titles passed by the trustees under the decree in equity cause No. 500 was accepted as good and was so reported.

Cross-examination.

By Mr. WORTHINGTON:

Q. What was the date of your birth? A. August 5, 1865.

Q. When did you first pay any attention, in any way, to the doings of title examiners in the District of Columbia? A. In December 1886.

Q. That was about twenty years after most of these trustees' sales you have spoken of had been made? A. Yes.

Q. Then you know nothing, of course, about what took place with reference to the question of whether these titles were good, in the office of the title examiners at or about the time the sales were made. A. Nothing at all, except from memoranda found in the office, and on which I based my researches.

Q. You said that Mr. William R. Woodard took up this question at some time and looked into it, and afterwards passed the title on his conclusions reached at that time. Is that correct? A. That is correct.

Q. Were you present when he made that examination?
100 A. I was not. I gather it simply from his notes of title made about that time.

Q. Is there anything on the notes to show whether he gave any, and if so what, consideration to the subject? A. Nothing except the notes themselves.

Q. Do the notes show any references to authorities or decisions; or do they show simply his conclusion? A. Simply his conclusion.

Subscribed and sworn to before me this — day of —, 1907.

Examiner in Chancery.

Further taking of these depositions was thereupon adjourned until Monday, November 25, 1907, at two o'clock p. m.

WASHINGTON, D. C., November 25, 1907—11:00 o'clock a. m.

Met pursuant to agreement at the office of B. F. Leighton, Columbian Law Building, Washington, D. C.

Present on behalf of the complainant, Mr. Leighton.

Present on behalf of the defendants, Mr. Worthington.

Whereupon THOMAS J. BECKER, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined

By Mr. LEIGHTON:

Q. Please state your full name? A. Thomas J. Becker.

101 Q. What is your occupation? A. I am Vice-President of the Real Estate Title Insurance Company.

Q. Are you a member of the Bar? A. Yes sir.

Q. How long have you been a member of the Bar? A. Sixteen years.

Q. How long have you been connected with the Real Estate Title Insurance Company? A. Fifteen years.

Q. How were you engaged before you went with the Title Company? A. I was with Mr. M. C. Barnard for two years.

Q. What was he? A. He was a title examiner.

Q. How extensive was his business? A. He had a very large private practice and he was also attorney for the Equitable Cooperative Building Association, which gave him a great deal of work.

Q. Is he now living or dead? A. He is now dead.

Q. Are you familiar with the property known as Metropolis View? A. It is a well known title to me.

Q. Are you familiar with the will of Washington Berry and equity proceedings No. 500 in the Supreme Court of the District of Columbia? A. Yes sir.

Q. State, if you know, what was the practice of Mr. Barnard in regard to titles coming through that will and those proceedings, in respect to what report he made upon them.

Mr. WORTHINGTON: I suppose the objection which we agreed should run against this sort of testimony at the last session may apply to this testimony.

Mr. LEIGHTON: Yes.

A. It was passed as a valid title.

Q. Did you know Mahlon Ashford in his lifetime? A. Yes sir.

Q. Who was he and what was his business? A. Before he was made president of the Real Estate Title Insurance Company he was a professional title examiner I think that was his exclusive work. Up to the time of his death he was president of the Real Estate Title Insurance Company, and the company was organized in 1881.

Q. What was his reputation at the Bar and in the community generally, as a real estate lawyer? A. As one of the best.

Q. Do you know what became of his examinations that he had made as a private lawyer, when the company was organized? A. The Real Estate Title Company has them.

Q. Can you state whether or not he, as a private examiner and lawyer, and as president of the company, took action with respect to titles in Metropolis View, derived through this will and under these equity proceedings?

Mr. WORTHINGTON: If this is based on papers that would come within the knowledge of the witness I object to it, on the ground that the papers are the best evidence.

A. Yes sir.

Q. Upon what is your answer based? A. It is based upon an examination of his papers, in the possession of the title company and by more recent cases, when he acted as President of the Company.

Q. Have you any personal knowledge as to his treatment of those titles? A. Yes; he passed them all as being valid.

Q. What was the practice of the Real Estate Company in that regard? A. To pass the titles as being valid.

Q. Did you ever hear any question raised with respect to the validity of these titles, among any real estate lawyers? A. None at all.

Q. When was the first query raised about the titles so far as you know? A. At the time of the filing of a bill by Mr. Worthington.

No Cross Examination.

Subscribed and sworn to before me this — day of —, A. D. 1907.

Examiner in Chancery.

104 JUDSON T. CULL, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined

By Mr. LEIGHTON:

Q. You may state your full name, age and occupation? A. My name is Judson T. Cull. I am a lawyer. I am at present the president of the Home Title Company and was at one time president of the Lawyers' Title Company.

Q. How long have you been at the Bar? A. I have been at the Bar since October 1868. My age is 62.

Q. Have you made any branch of law a specialty? A. Real estate and the examination of titles.

Q. Since your admission to the Bar? A. Yes. I have been constantly employed in that practice since I was admitted to the Bar.

Q. Who were the prominent examiners of titles at the time you came to the Bar. A. William H. Ward, Mahlon Ashford, William R. Woodard, Isaac L. Johnson, William Stone, Thomas S. Hopkins, Nathaniel Carusi, and John Ellis.

Q. What portion of the title business was done by the men you have named, up to the time of the formation of the title companies here? A. All title examinations were made by us, up to the time of the formation of the Real Estate Title Company, which was the first title company formed here.

Q. What is the practice now? A. The title work now is largely and principally done by the title companies.

105 Q. Of those old examiners you have mentioned, who survive? A. Do you mean survive in practice?

Q. That is what I mean. A. About the only one who survives in active practice is Mr. Jesse H. Wilson, besides myself. I did not name him before. He practiced for quite a number of years; but not as long as I did. Jackson H. Ralston, whom I did not name before, is also living, and he was in the business. He does not personally examine titles at this time.

Q. State whether or not you are familiar with the tract of land known as Metropolis View? A. I am.

Q. And the will of Washington Berry in equity proceedings No. 500? A. Yes sir.

Q. State whether or not you have had occasion to examine titles coming through that will and those equity proceedings. A. A number of times.

Q. What was your report upon the title, when called upon to ex-

amine it? A. That so far as the equity proceedings and the will were concerned, the title was a good title.

Q. What was the practice of the other real estate lawyers? A. Uniformly the same.

106 Q. While you were president of the Lawyers' Title Company, what was your practice? A. To report the title good.

Q. I understand you to say you are the president of the Home Title Company? A. Yes.

Q. How about the practice of that company? A. It is the same now.

Q. When was the question first raised, so far as you know, with respect to the validity of these titles? A. At the time of the filing of a suit, not long ago, by Mr. Worthington in behalf of some of the Berry people.

Q. Will you state how long you were with the Lawyers' Title Company? A. I was president of the company at its organization in 1896, and remained so down to about the year 1901.

No Cross Examination.

Subscribed and sworn to before me this — day of —, 1907.

_____,
Examiner in Chancery.

JULIUS A. MAEDEL, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined

By Mr. LEIGHTON:

Q. You may give your full name and your occupation?

107 A. My name is Julius A. Maedel. I am a member of the Bar of the District of Columbia.

Q. Have you any relation with the Lawyers' Title Company? A. I am president of the Lawyers' Title Company.

Q. Since when? A. I have been president of it since Mr. Cull ceased to be president in 1901.

Q. Have you made a specialty of any branch of the law? A. In the last six or seven years I have given more attention to real estate law than to anything else.

Q. Have you examined titles, as a private examiner? A. Yes sir.

Q. What are your duties as president, in connection with the company? A. I am not in the same position as president, as other presidents of companies are, because I do not give my entire time to it; so that I do not pass upon every title that comes in there. The only time I give particular attention to a title is when some question is raised by the examiners.

Q. State what is the practice of the company and of yourself with respect to titles that are derived under the will of Washington Berry and equity proceedings No. 500 in the Supreme Court of the District of Columbia, in the land known as Metropolis View? A. The company has always passed the titles, since Mr. Cull's retirement,
108 just as we did before, and has reported them good, so far as the will and equity proceedings were concerned.

Q. What was your own custom? A. I do not believe that I have had a personal case there. I cannot recollect about that.

Q. Can you tell how many examinations of titles your company has had since its organization, in Metropolis View? A. As near as I can get at it, it was somewhere between twenty and thirty.

Q. So far as your knowledge extends, has there ever been any question among real estate lawyers about the validity of titles derived through the will of Washington Berry and those equity proceedings? A. There never was any question until Mr. Worthington filed this suit.

Mr. WORTHINGTON: I object to the answer, on the ground that it is obvious the witness cannot state whether anybody else has ever had any question about it, and the answer is not confined to his own knowledge.

Cross-examination.

By Mr. WORTHINGTON:

Q. While you have been president of the Lawyers' Title Company who, in that company, has had more direct charge of passing upon titles? A. The examiners make their examinations and turn in their reports; and if they raise no question about the title of course it is passed. If any question is raised by them, the
109 matter is taken up by me and the examiners and I take it up and settle it.

Q. How many of these examiners have you had, during your incumbency of that presidency? A. Two.

Q. Who are they? A. Mr. Bishop and Mr. Sanders. They are the same examiners who were there when Mr. Cull was president.

Q. If they consider a title good, or the proceeding on which the title is based as an effective one, it never comes before you? A. It does not come before me.

Q. How many title companies have there been in the District of Columbia within the last ten years? A. The Real Estate Title Company and the Columbia Title Company which have since consolidated; the District Title Company and the Washington Title Company, which have since consolidated; the Lawyers', and the last one was the Home, of which Mr. Cull is now the president.

Q. While you have been connected with these matters of title companies and title examiners, what has been the custom in this District as to giving a certificate as to the validity of a title, to those for whom they make reports? A. I don't quite understand what you mean.

Q. I want to know whether they have been in the habit of giving certificates of title. A. Yes; that is what they were organized for.

Q. And if they have certified this particular title as to
110 Metropolis View, derived under the will of Washington Berry and equity proceedings No. 500, to be good, there is a question as to whether they are not liable to persons to whom they have given those certificates, in case it should be hereafter held by

the court that the title is not good? A. I suppose that would depend upon the wording of each certificate.

Q. It is a question that is likely to arise with all title examiners who have passed on that title? A. If they have issued a guaranty certificate it will. If they have simply made a report according to the record, and their opinion, it will not. Of course the question may arise. It may arise on any certificate.

Q. They are all more or less interested in the result of this suit to determine the validity of that title; are they not? A. Yes, in a general way.

Subscribed and sworn to before me this — day of —, 1907.

Examiner in Chancery.

WASHINGTON, D. C.,

TUESDAY, November 26, 1907—11 o'clock a. m.

Met pursuant to agreement.

Present on behalf of the complainants, Mr. Leighton.

111 Present on behalf of the defendants, Mr. Worthington.

Whereupon JUDSON T. CULL is recalled for cross-examination.

By Mr. WORTHINGTON:

Q. Mr. Cull, how long before you became connected with the Lawyers' Title Company, had you been engaged in the examination of titles in this District? A. Since 1868. I was admitted to the Bar in October, 1868, if I remember correctly, and I immediately went into that business.

Q. While you were in that business, and before you became connected with the Lawyers' Title Company, did you have any occasion to make an examination of the title to any of the land included in Metropolis View? A. Yes. I do not remember exactly at what time, but I did have an occasion to examine property in Metropolis View prior to the organization of the Lawyers' Title Company.

Q. How often? A. That is hard to tell; but probably several times.

Q. When a title in that tract has come before you, after you became connected with the Lawyers' Title Company, did you make a new examination or did you simply rely upon previous examinations which you had made? A. The practice in the examination of title is that if the examination brings down the title to more
112 than the particular piece that you are examining, you use your prior acquired examination to the extent that it goes in the second one, and so on in the third and fourth.

Q. What was the fact as to the examinations in that tract which you made after you became President of the Lawyers' Title Company? A. When I became President of the Lawyers' Title Company it made its own examinations outside of anything I had done. My business as an examiner has been as an individual examiner, prior to going into the Lawyers' Title Company.

Q. As a matter of fact, while you were President of the Lawyers'

Title Company, did you take up and pass upon any property in Metropolis View? A. Yes sir.

Q. How often? A. That I cannot remember.

Q. Do you remember when you first passed upon it, as an officer of the Title Company? A. No; I cannot fix the date. It has been a long time ago, and there are so many of these things going through our heads, day after day, that we cannot very well remember the time.

Q. I will ask you whether you do not remember that when you first considered one of these titles for the Lawyers' Title Company, you made an examination and reported that, in your opinion, the title was bad because under Equity Suit No. 500 the Court had not jurisdiction of all the parties or for some reason did not have
113 jurisdiction? A. That I do not remember, Mr. Worthington. I could only tell that by seeing the record. I have not seen a record of the Lawyers' Title Company for years; and it would be impossible for me to state.

Q. You cannot state that you did not do that? A. I cannot say that I did not. The probabilities are though that even if that was my original opinion in a given case, such as you suggest, that my opinion was reversed on second thought. I have no remembrance at all of ever having reported finally any title in Metropolis View to be bad, in consequence of deficiencies in that suit.

Q. I am not inquiring whether you reported adversely on it finally; but whether you did not at first, in writing, report the title as bad for the reason I have stated. A. I cannot remember.

Q. Can you state whether, on more than one occasion, you have concluded that the title was bad? A. I cannot say. My remembrance is that in no case have I ever finally turned down one of those titles as bad. It may be likely that when the examination of that property took place, in considering the fact and the law developed by the record in the case, I may have speculated and, at times, had doubts, which were afterwards removed.

Redirect examination.

By Mr. LEIGHTON:

Q. Can you examine the files of the Lawyers' Title Com-
114 pany and say whether or not you ever have held in question the title coming through the will of Washington Berry and Equity proceedings No. 500. A. I have no access to the records of the Lawyers' Title Company at the present time, as I have no connection with it.

Mr. LEIGHTON: I reserve the right to recall Mr. Cull if I so desire, for further re-direct examination, in reference to the particular matter under discussion.

Subscribed and sworn to before me this — day of —, 1907.

Examiner in Chancery.

WASHINGTON, D. C., *November 27th, 1907*—1:15 o'clock p. m.

Met pursuant to notice, at the office of B. F. Leighton, Esq.,
Columbian Building.

Present on behalf of the complainant, Mr. Leighton.

Present on behalf of defendants, Mr. Worthington.

JUDSON T. CULL, a witness heretofore examined on behalf of the complainant, was recalled and testified as follows:

By Mr. LEIGHTON:

Q. Mr. Cull, since our session yesterday, have you examined the files of the Lawyers' Title Insurance Company touching the
115 matter in respect to which you were cross examined by Mr. Worthington yesterday? A. I have seen the records of the case that I presume was referred to in that question, and examined them; yes.

Q. What have you to say about it?

Mr. WORTHINGTON: One moment. In addition to the objections heretofore made, I object to any reference to the contents of a writing unless it is produced.

Mr. LEIGHTON: I do not know whether I can produce that writing. If you insist on its being produced, I will go down and see if I can get it. I do not know whether I can get it or not.

Mr. WORTHINGTON: A subpoena of the Court will produce it, if nothing else will.

Mr. LEIGHTON: I will go there and see if I can get it.

(Mr. Leighton thereupon left the room and subsequently returned.)

By Mr. LEIGHTON:

Q. I hand you what purports to be a file of the Title Company, and ask you if that is the file to which you refer? A. Yes, sir.

Q. State what your note or memorandum or query was in respect to the title, and how you resolved it? A. I will state that in this
case I reported the title, without qualification, good on December
26th, 1899; that that followed an investigation of the points
116 involved in the will of Washington Berry and Equity Cause 500; that in the course of that investigation I did what was a common practice to do in examinations, and that was when you were making an examination of the record and the points came up to your mind, you would make private notes on the record, showing what points you had considered, so that at any future time when the reference had to be referred to or used, you would be aware of the fact that you had considered certain points in the case and that you would not have to go over the work a second time. In this particular case I had made, previously to the final report, this private memorandum for my own use and the use of the office, to show that process had been gone through with. It reads as follows:

"Private note. I doubt whether under Washington Berry's will a sale was legal under Equity 500, because a sale was only to take place on marriage or death of the last of his five devisee daughters,

and when bill was filed Eliza T. Berry was alive and single, and her consent was after bill filed, which could not give a jurisdiction above, in view of a restriction of will and her life estate."

Then I refer:

"See *Shannon vs. Moore and Inglehart* and *vs. Stansbury*."

I will state that what I have previously testified is strictly true, that I have never known or heard of a single title in Metropolis View having been turned down or reported unfavorably in consequence of the questions arising out of the will of Washington Berry or Equity cause 500.

The questions were such that they necessarily involved study, thought and investigation. In this case, which is the first case that the Lawyers' Title Company had to contend with involving these things,—in that case, the first case as we call it, the questions were gone over by me as carefully as I was able to do it, and those doubts in the course of investigation arose in my mind, and were noted, as was the custom, as I have said, and finally resulted in the final opinion that the title was a perfectly good title. That same practice was followed in other cases, and is followed now by me. Whenever a question of sufficient consequence comes up in an examination of title, there is some memorandum made, so that in the future investigations, trouble may be saved by referring to what we call the trunk case, where it was originally considered, and taking that as a basis for future action. In other words, we do not, having investigated a point once, keep on investigating it the numerous times that it might come up before us afterwards, but take the original investigation and use that as what we call a trunk case or basis case.

Q. Had you or not, prior to this examination, examined the title to property coming through this tract, Metropolis View? A. I am under the impression that I had, but the Lawyers' Title Company had started in 1896, and this case appears to be the first case in which they were called to pass on these questions. Consequently, in making up the record of the case for the Company's use, then and thereafter, the investigation was made and a record made of the fact, that it had been made, so that it could be used in the future.

Q. Did the certificate which was based upon that examination, which you issued to the party, contain anything with reference to the questions or doubts that you have suggested in your original record? A. No, sir; unless the matter is one that finally remains in the mind as a doubtful question, it never does appear. In the examination of titles we have all kinds of questions coming up in relation to the construction of wills, deeds, trusts, powers and all kinds of things; and when we have made an investigation and arrived at an opinion, in our minds, beyond any doubt we report absolutely and unqualifiedly that the title is good, as we have in this case. If, however, those doubts are not solved with perfect satisfaction to ourselves, but remain as doubts, then we protect ourselves from the doubts by calling the attention of the client to the fact, and throwing the responsibility on him of taking the property or not, as he pleases. In this case it seems that the final result of it was that there was no doubt.

Cross-examination.

By Mr. WORTHINGTON:

Q. In your investigation of Washington Berry's will and of Equity proceedings No. 500, did you consider whether or not, under that will, the children of Washington Berry's daughters took any
 119 interest in Metropolis View? A. All of those questions, and all other questions that the will and the Equity case itself suggested were considered.

Q. Did you decide whether they did or did not take any interest? A. My opinion has been and is now, under a proper construction of that will, those daughters took an absolute fee simple in that property; and that the key to the safe construction of the will was that he had one idea in view, his daughters being helpless, which was that he was particularly anxious to provide for those daughters and he was particularly anxious to provide for them in view of the fact that they were unmarried at the time; that his intention was, while he gave them the property absolutely in fee simple that they should use the property while they were unmarried as a home; that when they were married they were to get out of it, and if they became single again by death of the husband or by divorce or by some process by reason of which they ceased to have a supporter in the nature of a husband; that they would come back into the enjoyment of it; but it was a provision that they should have a home. The title was vested in them, in my opinion, and the enjoyment of it was opened and closed as they were married or as they were unmarried.

Q. You do not think then that if the children of these daughters took any interest in Metropolis View it was taken away by the sale under Equity proceedings No. 500 to which they were not
 120 parties? A. I consider that the property was given to the daughters of Washington Berry, and that Chancery cause No. 500 took away the whole property; but the grandchildren, or the children of those children, only had an interest derived not through the will directly but directly through the parents of the children themselves. My construction of the will was that the language of it, the situation and everything led to the inevitable conclusion that the grandchildren were not considered at all; and that it was just the same as if it had been conveyed to a man and his heirs; that the grandchildren were simply used as a secondary matter and that the primary thing was the children themselves.

Q. You have not answered my question. A. In what respect?

Q. The question was, "You do not think that if the children of those daughters took any interest in Metropolis View, it was taken away by the sale under Equity proceedings No. 500 to which they were not parties?" A. If the grandchildren took a direct and immediate interest under the will then, as they were not parties to that cause, of course the decree in the case would not operate on them.

Subscribed and sworn to before me this — day of — A. D. 1907.

Examiner in Chancery.

Counsel for the complainant thereupon announced the testimony closed.

121 DISTRICT OF COLUMBIA, ss.:

I, William Herbert Smith, Examiner in Chancery in and for the City of Washington, District of Columbia, do hereby certify that the foregoing depositions were taken down by me stenographically at the times and place mentioned in the caption thereof; that said depositions were thereupon reduced to typewriting; that said witnesses were first duly sworn to testify the truth, the whole truth and nothing but the truth touching the matters in controversy; that the signatures thereto were attached by me as Examiner, by consent of counsel for the respective parties.

I further certify that I am not of counsel, nor in any wise interested in the result of said suit.

Testimony on Behalf of Defendants.

Filed December 27, 1907.

In the Supreme Court of the District of Columbia.

In Equity. No. 27071.

HENRY P. SANDERS

vs.

ALEXANDER D. JOHNSON ET AL.

WASHINGTON, D. C., December 7, 1907—10 o'clock a. m.

Met pursuant to agreement, at the office of A. S. Worthington, Esq., Columbian Law Building, Washington, D. C.

122 Present on behalf of the defendants: Mr. Worthington.
Present on behalf of the complainant: Mr. Leighton.

Whereupon JOHN B. N. BERRY, a witness of lawful age, called by and on behalf of the defendants, having been first duly sworn, is examined:

By Mr. WORTHINGTON:

Q. Please state your full name. A. John B. N. Berry.

Q. What is your residence? A. 2501 Pennsylvania Ave., N. W., Washington, D. C.

Q. What is your age? A. I was 65 on the 14th of July, 1907.

Q. Were you the husband of Rosalie Berry, who was the daughter of Washington Berry? A. Yes sir.

Q. When did you marry her? A. The 1st of November, 1864.

Q. Have there been children of that marriage? A. Yes sir.

Q. Can you give their names and the dates of their birth? A. John H. Berry, born October 14, 1866; Elsie Thomas Berry, born November 26, 1868; Louise Y. B. Duvall, born November 9, 1870; Imogene Berry Tubman, born August 21, 1873; Eugene Benton Berry, born January 20, 1876; and Claude Nathaniel Berry, born March 1, 1878.

Q. Did you know Anna Maria Berry, your wife's sister? A. Yes.

Q. Do you know whether or not she was married to John A. Middleton? A. So far as my knowledge goes, they were married because they lived together as man and wife, and I was married in their house.

Q. Were they generally accepted by everybody as husband and wife, and did they live together in that relation? A. Yes sir.

Q. What can you tell us as to the children of John A. Middleton and his wife, Anna Maria? A. At the time of my marriage, on November 1, 1864, there were two children living, John A. Middleton and Lydia Thomas Middleton. After that there were twins born, Willie and a girl whose name I cannot now recall. They are both dead.

Q. You speak of three children of John A. Middleton and Anna Maria Middleton who are dead; did they come to maturity? A. No; they died in infancy.

Q. Now, go on. A. Then there were twins, David Middleton and Washington B. Middleton. Then followed Thomas W. B. Middleton.

Q. How long ago did the three children of John A. Middleton, of whom you have spoken and who died in infancy, die?

124 A. One died about 1886 or 1887, and the other two died about 1868.

Q. About how old was John A. Middleton, who was the son of John A. Middleton and Anna Maria Berry, at the time of your marriage in 1864? A. About seven years old.

Q. Did you know Amelia Owen Berry, another of your wife's sisters? A. Yes.

Q. Do you know whether or not she married? A. She married Allen Lucian Berry.

Q. Were you present at the wedding? A. No sir.

Q. How do you know they were husband and wife? A. They lived together as husband and wife, and at the time of my marriage they had two children.

Q. Were they universally recognized in the family as being husband and wife? A. Yes.

Q. At the time of your marriage, in 1864, they had two children? A. Yes.

Q. Who were they? A. Leila Thomas Berry and Albert L. Berry.

Q. How old was Leila Thomas Berry when you were married in 1864? A. She was in the neighborhood of four years old.

Q. How old was Albert L. Berry? A. He was about eighteen months or two years old.

Q. What other children, if any, did Allen Lucian Berry and his wife Amelia O. Berry have? A. The next child was Frederick Brooke Berry, who was born about 1876.

125 Q. Did you know Mary E. Berry? A. Yes sir.

Q. She was another of your wife's sisters? A. Yes.

Q. Do you know whether or not she was married, and, if so, to whom? A. Yes; she was married to E. Dorsey Johnson.

Q. About when? A. About 1863. I can testify to that marriage, as I saw it performed.

Q. You were present? A. Yes; I was present.

Q. What children were there of that marriage? A. There was a child born about 1864 or 1865, but it only lived a short while. Then Alexander Dorsey Johnson was born, about 1867.

Q. Do you know whether that child was born before or after the proceedings in Equity Cause 500? A. He was born before.

Q. Do you know what age that infant attained before he died? A. I think he lived only a couple of months, according to my recollection. It is so long ago that my recollection is vague.

Q. Did you know Eliza T. Berry, your wife's sister? A. Very well.

126 Q. Is she still living? A. No sir.

Q. When did she die? A. I think she died over three years ago.

Q. Give the date of her death, as near as you can. A. In May, 1903.

Q. The record of her death would appear in the Health Office? A. Yes sir; I furnished you with a certificate of it.

Mr. WORTHINGTON: I will obtain that certificate and offer it in evidence.

By Mr. WORTHINGTON:

Q. Do you know whether Eliza T. Berry ever married? A. No sir; she never married, to my knowledge.

Cross-examination.

By Mr. LEIGHTON:

Q. Did Eliza T. Berry live here all her life? A. No; she lived for a short while in Baltimore.

Q. Did she die here? A. She died here. She was living here for over thirty years in the latter part of her life.

Q. How long did she live here before she died? A. I said she lived here over thirty years.

JOHN B. N. BERRY,
By the Examiner by Consent.

Subscribed and sworn to before me this — day of — 1907.
— — —

127 THOMAS W. B. MIDDLETON, a witness of lawful age, called by and on behalf of the defendants, having been first duly sworn, is examined.

By Mr. WORTHINGTON:

Q. Please state your full name. A. Thomas W. B. Middleton.

Q. What is your residence and occupation? A. I live at 398 East 30th Street, Paterson, N. J., and I am employed by the United

States Mortgage & Trust Company, at No. 55 Cedar Street, New York City.

Q. Who were your parents? A. John Alexander Middleton and Anna Maria Middleton.

Q. Your mother was a daughter of whom? A. Of Washington Berry.

Q. When were you born? A. October 6, 1870.

Q. Have you any brothers and sisters living? A. I have.

Q. By the same parents? A. Yes sir.

Q. Who are they? A. John Alexander Middleton, Washington Berry Middleton and David Lane Middleton.

Q. Do you know from the reputation in the family the dates of the births of these three brothers? A. I do.

Q. What are those dates? A. John Alexander Middleton
128 was born February 12, 1857; Washington Berry Middleton
and David Lane Middleton are twins, and were born November 4, 1867.

Q. Were there any other children born to your parents who are not living? A. Yes sir.

Q. When? A. To the best of my belief, the first child born was a boy. I think he was born in New York City before my brother John Alexander. The second one was John Alexander. Then came my sister Lydia. I could not tell you the date when she was born, but I can get that date.

Q. How near can you approximate it? A. I should say that John A. was born in 1857, and Washington Berry Middleton and David Lane Middleton were born in 1867. The other were three children born in between them, the first born being Lydia and after her the twins, Willie and Annie.

Q. Did those twins live to maturity? A. No; Lydia, Willie and Annie died in childhood. They died, according to my recollection, within about two weeks of each other, from diphtheria.

Q. Did you know your aunt, Eliza T. Berry? A. Only by reputation.

Q. Do you know from the reputation in the family when she died? A. I do. I know not only by reputation, but I know personally in a way when she died. I think her estate was settled about 1904 or 1905, and she must have died about 1903 or 1904. I can give you these dates.

129 Q. Was she married? A. No sir; she never married.

Mr. LEIGHTON: I have no cross examination.

THOMAS W. B. MIDDLETON,
By the Examiner by Consent.

Subscribed and sworn to before me this — day of —, 1907.
— — —

The further taking of these depositions was thereupon adjourned, subject to notice.

WASHINGTON, D. C., *December 10, 1907*—3 o'clock p. m.

Met pursuant to agreement at the office of A. S. Worthington, Columbian Law Building, Washington, D. C.

Present on behalf of the defendants, Mr. Worthington.

Present on behalf of the complainants, Mr. Leighton.

Whereupon JOHN B. N. BERRY resumed the stand for further direct examination.

By Mr. WORTHINGTON:

Q. When did your wife, the daughter of Washington Berry, die?

A. I think she died in 1883.

130 Q. It was about that time? A. Yes sir; about that time.

Q. Do you know whether or not the other sisters of Eliza T. Berry, who were daughters of Washington Berry, died before Eliza T. Berry did? A. Yes sir; they all died some years before Eliza T. Berry died.

Mr. WORTHINGTON: I now offer in evidence a certified copy of the certificate of death of Eliza Thomas Berry, from the *Land* Records of the Health Office of the District of Columbia.

The above mentioned certified copy is herewith filed and marked "Exhibit J. B. N. B. No. 1."

Mr. LEIGHTON: I have no cross examination.

JOHN B. N. BERRY,

By the Examiner by Consent.

Subscribed and sworn to before me this — day of —, A. D. 1907.

The further taking of these depositions was thereupon adjourned subject to notice.

WASHINGTON, D. C., *December 26, 1907.*

It was stipulated and agreed by and between counsel for the respective parties that the following letter may be made a part of these depositions, to be considered as a correction to the testimony of Thomas W. B. Middleton, hereinbefore appearing:

131

"UNITED STATES MORTGAGE & TRUST CO.,

"55 CEDAR STREET, NEW YORK, *December 13, 1907.*

"Mr. A. S. Worthington, Washington, D. C.

"DEAR SIR: I find I misstated some facts last Saturday, rel. to the death of my brothers and sisters, and give you herewith correct dates of births and deaths:

"Liddie Berry Middleton died November 10, 1869, age 9 years, 7 months and 7 days.

"Willie Thomas Middleton, born April 6, 1865; died July 19, 1865, age 3 months, 13 days.

"Annie Gwynn Middleton, born April 6, 1865; died October 31, 1869, age 4 years, 6 months, 25 days.

"Yours truly,

(Signed)

9—1900A

"T. W. B. MIDDLETON."

132

EXHIBIT J. B. N. B. No. 1.

A Transcript from the Records of Deaths.

Certificate of Death.

No. burial permit.

No. of record.

148880.

District of Columbia.

148697.

Full Instructions for the Guidance of those using this Blank, and space for remarks may be found on the other side.

1. Date of this Death May 2, 1903
2. Full Name of Deceased Eliza Thomas Berry
If an unnamed infant, insert full name of both parents.
3. Sex: 4. Age: 5. Color: Conjugal Conditions:
- Female Years 70 White Single
- Male Months — Colored Married
- Days — Indian Widowed
- Chinese Divorced
- Japanese

Under sex, color, and conjugal condition, strike out the words not applicable.

Under color, the term "colored" includes all of African descent, whether of pure or mixed blood.

7. Occupation None
8. Birthplace of Deceased District of Columbia
9. Birthplace of Father Unknown
10. Birthplace of Mother Unknown
11. Duration of Residence in This District Seventy years
12. Place of Death Government Hospital for the Insane
13. Cause of Death Duration.
- Primary Senile Dementia { Unknown }
- Immediate Exhaustion from Acute Diarrhea { 7 days }

14. If Death Occurred in an Institution, give:
Name of Institution Government Hospital for the Insane
Length of Time Deceased was an Inmate Since Feb'y 14, 1903.

- 133 15. If Deceased Did Not Die at His or Her Residence, give:
Place of Residence Washington, D. C.

I hereby certify that I attended the deceased professionally during her last illness.

CHAS. H. CLARK, M. D.

Address, Asst. Physician Govt. Hosp. for Insane.

To be Filled Out and Signed by the Undertaker.

Place of Burial Rock Creek Cemetery

Date of Burial May 4th 1903

If Body is to be Buried Outside of the District, State:

Route of Transportation — Date of Removal —, — 190—.

Signature JOHN R. LOWE, *Undertaker.*

Address 612 11 St. N. W.

Remarks:

Correct A. C. P.

WASHINGTON, D. C., Dec. 7, 1907.

The foregoing is a true and correct copy of a certificate of death on file with the Health Department of the District of Columbia, and duly Recorded in the records of said Department.

WM. C. WOODWARD, *M. D.,*
Health Officer, District of Columbia.

Attest:

[SEAL.]

HARRY C. McLEAN, *Chief Clerk.*

134 *Petition of the Washington Loan and Trust Company.*

Filed March 2, 1908.

In the Supreme Court of the District of Columbia.

No. 27071. In Equity.

HENRY P. SANDERS, Complainant,

vs.

ALEXANDER D. JOHNSON ET AL., Defendants.

Comes now The Washington Loan and Trust Company and represents to the Court as follows:

1. That it is a body corporate organized under the laws of the United States relating to the District of Columbia, and having its habitat and only place of business in said District. As such body corporate it was authorized and empowered by the terms and provisions of its charter to act as executor and trustee, and to execute all kinds of trusts.

2. That heretofore, to wit, on the 29th day of December, 1907, the complainant, Henry P. Sanders, departed this life testate; that he designated and appointed your petitioner as the executor and trustee of his last will and testament; that he devised the real estate in complainant's bill described unto your petitioner in fee simple upon certain trusts in said testamentary writing fully set out, and that the legal title to said property is now vested in your petitioner; that said will was duly admitted to probate and record in this court,

holding a court for probate business for said District, on the 26th day of February, 1908, and letters testamentary thereon were issued unto your petitioner. A duly certified copy of

said will is attached to this petition marked "Petitioner's Exhibit No. 1," and is prayed to be read and considered in connection herewith.

3. Your petitioner deems it for the interest and advantage of decedent's estate that this suit be prosecuted to final hearing and decree.

It therefore prays as follows:

1. That an order may be passed by this Honorable Court substituting it, The Washington Loan and Trust Company, as party complainant in the place and stead of the said Henry P. Sanders, deceased, and that it may be authorized to prosecute said suit to final hearing and decree.

2. That it may have such other and further relief as the nature of the case may require.

THE WASHINGTON LOAN AND
TRUST COMPANY,

By FREDK. EICHELBERGER,

[SEAL.]

Trust Officer.

DISTRICT OF COLUMBIA, ss:

I, Fredk. Eichelberger do solemnly swear that I am the Trust Officer of The Washington Loan and Trust Company, and as such officer have subscribed the foregoing and annexed petition; that I have read the same, and know the contents thereof; that the facts therein stated of my own personal knowledge are true; and that those stated upon information and belief I believe to be true.

FREDK. EICHELBERGER.

Subscribed and sworn to before me this 28th day of February, A. D. 1908.

[SEAL.]

ALFRED B. DENT,
Notary Public.

136

PETITIONER'S EXHIBIT No. 1.

Filed March 2, 1908.

I, Henry P. Sanders, of the City of Washington, District of Columbia, being of sound and disposing mind, memory and understanding, do make, publish and declare this instrument as and for my last will and testament, hereby expressly revoking all other and former wills by me at any time heretofore made and published.

First. After the payment of all my just debts including funeral expenses, I direct my hereinafter named Executor to expend out of my estate the sum of five hundred (500) dollars, or so much thereof as may be necessary, for the erection of a monument in my burial lot in accordance with designs to be approved by my wife, Alice W. Sanders.

Henry P. Sanders.

Second. The residence No. 1504 21st Street, Northwest, Washington, D. C., being held in joint tenancy, at my decease will pass to my said wife, Alice W. Sanders, by right of survivorship.

Third. I give and bequeath unto my wife, Alice W. Sanders, all of my household furniture, including musical instruments, bric-a-brac, pictures and books, absolutely.

Fourth. I give and bequeath unto my sister, Ellen Bennet, the sum of one thousand (1000) dollars, absolutely.

Fifth. All the rest, residue and remainder of my property of every kind and description, real, personal and mixed, where-soever and howsoever situated, now owned or that may hereafter be acquired by me, I give, devise and bequeath unto The Wash-
137 ington Loan and Trust Company of Washington, D. C., a corporation existing under and by virtue of the laws of the United States, absolutely and in fee simple, the same to be held by it in and upon the following trusts, that is to say:

In trust to take charge of, manage, control, sell, invest and re-invest the same or any part thereof and to invest and re-invest the proceeds thereof for the best interests of my estate, and out of the net income derived therefrom to pay to my sister, Annie Sanders, the sum of twenty-five (25) dollars each month for and during the term of her natural life and to pay the remainder of said income, in quarterly installments, to my wife, Alice W. Sanders, during the term of her natural life; and, upon the death of either my sister, Annie Sanders, or of my said wife, Alice W. Sanders, I direct that the income paid to her be added to and made a part of the principal of this Trust until the death of the survivor of them, at which time my said Trustee shall reduce my entire estate then remaining in its hands to cash and divide the net proceeds thereof equally among all of my nephews and nieces, absolutely; and in the event that any of my said nephews and nieces should then be deceased with issue him, her or them surviving, such issue shall take the share or shares of its deceased parent or parents, share and share alike.

Lastly. I hereby nominate, constitute and appoint The Washington Loan and Trust Company of Washington, D. C., the Executor of this my last will and testament.

138 Witness my hand and seal this 9th day of August, A. D. 1901.

HENRY P. SANDERS. [SEAL.]

Then and there signed, sealed, published and declared by the said Testator, Henry P. Sanders, as and for his last will and testament in the presence of us, who, at his request, in his presence and in the presence of each other, have hereunto set our hands as subscribing witnesses.

ALFRED B. DENT, Washington, D. C.
R. F. MILLER, " "
ANDREW PARKER, " "

Supreme Court of the District of Columbia, Holding Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

I, Wm. C. Taylor, Deputy Register of Wills for the District of Columbia, Clerk of the Probate Court, Do hereby Certify, That the foregoing is a true copy of the original will of Henry P. Sanders, deceased, filed and recorded in the office of the Register of Wills for the District of Columbia, Clerk of the Probate Court, aforesaid; and that the said will, after having been duly proven, was, by order of the said Court, in accordance with the laws of the District of Columbia, admitted to probate and record on the 26th day of February, A. D. one thousand nine hundred and eight.

139 I further Certify, That said will was duly executed and proved agreeably to the laws and usages of the District of Columbia, and that I have compared the foregoing copy of said will with the original record in said office, and find it to be a full, true and correct transcript thereof.

Witness my hand and the seal of the said Probate Court, this 28th day of February, A. D. 1908.

[SEAL.]

WM. C. TAYLOR,
*Deputy Register of Wills for the District of
Columbia, Clerk of the Probate Court.*

140 *Order Making the Washington Loan & Trust Co. Party Complainant.*

Filed March 2, 1908.

In the Supreme Court of the District of Columbia.

No. 27071. In Equity.

HENRY P. SANDERS, Complainant,

vs.

ALEXANDER D. JOHNSON ET AL., Defendants.

Upon consideration of the petition of The Washington Loan and Trust Company, and the exhibit attached thereto, it is this 2nd day of March, A. D. 1908, ordered that The Washington Loan and Trust Company, of the City of Washington, District of Columbia, trustee of the Estate of Henry P. Sanders deceased, be, and it hereby is, made party complainant in the above entitled cause in the place and stead of Henry P. Sanders, deceased, and that it have liberty to prosecute said cause to final hearing and decree.

By the Court, /

HARRY M. CLABAUGH,
Chief Justice.

141

Final Decree.

Filed April 6, 1908.

In the Supreme Court of the District of Columbia.

In Equity. No. 27071.

THE WASHINGTON LOAN AND TRUST COMPANY, a Body Corporate,
Complainant,*vs.*

ALEXANDER D. JOHNSON ET AL., Defendants.

This cause came on to be heard at this term of court, on bill, answer, depositions and decree *pro confesso* as to certain of the defendants, and was argued by counsel, on consideration whereof, it is this 6th day of April, 1908, adjudged, ordered and decreed that the decree *pro confesso* heretofore taken against the defendants numbered from fifteen to twenty-four, both inclusive, be, and the same hereby is made absolute. It is further adjudged, ordered and decreed that the title of complainant, in and to the real estate described in said bill of complaint, be, and it is hereby declared to be complete and perfect, and that the defendants, and each of them be, and they hereby are perpetually enjoined from asserting any title, by way of sale, or otherwise, or making any claim or demand to, or against said real estate, or any part thereof, as against said complainant, its successors and assigns; and that the defendants, Thomas W. B. Middleton and Eugene Benton Berry, Trustees in Equity Cause No.

26,464, be, and they hereby are restrained and enjoined from
142 further proceedings, either at law or in equity, or in any manner or form asserting or claiming any interest in and to said real estate as described in complainant's bill; and that the complainant have and recover against the defendants numbered from one to fourteen, both inclusive, its costs, to be taxed by the clerk, and that it have execution therefor as at law.

By the Court:

HARRY M. CLABAUGH,
Chief Justice.

Defendants numbered from one to fourteen, both inclusive, in open court, appeal from this decree, to the Court of Appeals of the District of Columbia, and the penalty of this appeal bond for costs is fixed at the sum of \$100, or, at the option of appellants, they may deposit \$50 in cash, in lieu of bond, with the clerk of this court.

HARRY M. CLABAUGH,
*Chief Justice.**Memorandum.*

April 15, 1908.—\$50.00 deposited by defendants in lieu of Appeal Bond.

143 *Directions to Clerk for Preparation of Transcript of Record.*

Filed April 14, 1908.

In the Supreme Court of the District of Columbia.

No. 27071. Equity.

WASHINGTON LOAN AND TRUST COMPANY, Complainant,
vs.

ALEXANDER D. JOHNSON ET AL., Defendants.

The Clerk of the Court will please include in the transcript of record on appeal in the above entitled cause the following papers:

1. Bill of complaint, appearance and order and exhibits.
2. Order of Publication.
3. *Pro confesso* against defendants 15-24 inclusive.
4. Proof of Publication Washington Law Reporter and Evening Star.
5. Affidavit as to mailing of copies, and jurat.
6. Answer of defendants 1-14 inc. and appearance of A. S. Worthington, as their solicitor.
7. Replication.
8. Depositions for complainants and defendants.
9. Petition of Washington Loan and Trust Company to be made party complainant.
10. Order making Company party complainant.
11. Decree vesting title in complainant.

A. S. WORTHINGTON.

144 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 143, both inclusive, to be a true and correct transcript of the record according to directions of Counsel herein filed, copy of which is made part of this transcript, in cause No. 27071 Equity, wherein The Washington Loan And Trust Company, a body corporate, is Complainant, and Alexander D. Johnson, *et als.* are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 27th day of April, A. D. 1908.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1900. Alexander D. Johnson *et al.*, appellants, *vs.* The Washington Loan and Trust Co. Court of Appeals, District of Columbia. Filed Apr. 27, 1908. Henry W. Hodges, clerk.

THURSDAY, *October 15th*, A. D. 1908.

No. 1900.

ALEXANDER D. JOHNSON, ELSIE THOMAS BERRY, LOUISE Y. B.
DUVALL, IMOGENE BERRY TUBMAN et al., Appellants,

vs.

THE WASHINGTON LOAN AND TRUST COMPANY.

The argument in the above entitled cause was commenced by Mr. A. S. Worthington, attorney for the appellants, and was continued by Mr. B. F. Leighton, attorney for the appellee, and was concluded by Mr. A. S. Worthington, attorney for the appellants.

No. 1900.

ALEXANDER D. JOHNSON, ELISE THOMAS BERRY, LOUISE Y. B.
DUVALL, IMOGENE BERRY TUBMAN et al., Appellants,

vs.

THE WASHINGTON LOAN AND TRUST COMPANY.

Opinion.

Mr. Chief Justice SHEPARD delivered the opinion of the Court:

This suit was begun by Henry P. Sanders against the appellants, who are the descendants of three of the daughters of Washington Berry, deceased, to remove cloud from title to certain parcels of land in the District of Columbia, parts of a tract called Metropolis View, of which the said Washington Berry was seized and possessed at the time of his death in 1856. Complainant avers that he is seized as of fee of said parcels of land, which were conveyed to him by deed from Lydia M. Edmonds December 15, 1905; that said Metropolis View tract containing about 410 acres of land, was owned and occupied by Washington Berry as a home at the time of his death in 1856. That complainant derives his title to the said parcels through certain conveyances of record and under and through certain proceedings and decrees had and passed by the Supreme Court of the District of Columbia in Equity Cause No. 500, begun September, 1865, wherein Anna Maria Middleton and other persons named were defendants, the said defendants comprising the children of said Washington Berry. It was alleged in the bill in that cause that, at the time of his death said Washington Berry had five daughters and three sons living, and was survived by his widow, Eliza Thomas Berry. That by will made in 1852, the said Washington Berry devised the said Metropolis View tract, which was his home-stead, to his said widow for life, and provided that said estate should be kept and reserved as a home for his daughters so long as they should remain single and unmarried, and after the death of his said widow, he devised the said estate to his daughters being single and unmarried, and on the death or marriage of the

last of them, directed that said estate should be sold by his executors and proceeds of the sale distributed among his daughters living at his death, and their children and descendants *per stirpes*. That Eliza Thomas Berry and Washington L. Berry were appointed executors of said will. The said Eliza Thomas Berry assumed the office of executrix, and Washington L. Berry declined. That at the death of testator all of his said daughters were unmarried, except Anna Maria, who was intermarried with John A. Middleton. That the rest of said daughters had, except said Eliza Thomas, who remained single, married, and that all of the said children and heirs at law of testator had attained the age of 21 years, except Rosalie Eugenia, who was then 18 years of age. That the said estate of Metropolis View was not capable of advantageous partition among the said daughters, and, if so capable, partition could not be made owing to the nonage of said Rosalie Eugenia, and that the sale of said real estate would be to the interest and advantage of said infant as well as of the other devisees thereof; that the said Eliza Thomas, the only one of said devisees unmarried, was willing to relinquish her right to the possession and enjoyment of said estate whilst unmarried and to assent to the sale thereof and the equal division of the proceeds of sale irrespective of such right of possession and enjoyment; that during the late war the said estate had been mainly in the occupation of soldiers by whom much injury had been done thereto, and the rents and profits had not been sufficient to pay taxes and make repairs; that the vault reserved by said will had been destroyed so that it was necessary to remove the bodies therein deposited, and that in consequence of said destruction all of the aforesaid heirs at law were willing that said burial ground should be sold with the residue of said estate and that the proceeds of said burial ground should be equally distributed among all of said heirs at law; that the purchase and maintenance of said estate by said sons of said testator, or some of them, was impracticable for want of means, and that the retention of said burial ground and vault after the residue of said estate had passed into other hands, would not be in accordance with the intention of the testator. Complainant alleges that all of the defendants to said equity cause No. 500 appeared and answered said bill, consenting to the relief prayed for therein, the said Rosalie Eugenia, by a guardian ad litem appointed in her presence and with her consent by the court. That the said Eliza T. Berry, in and by her answer, stated that she was willing to relinquish, and thereby did relinquish, upon the sale of the estate in the bill mentioned her right to the possession and enjoyment thereof whilst unmarried, and consented to the distribution of proceeds of sale as prayed by said bill. That said Equity cause No. 500 was thereupon referred to the auditor of the court on the 19th of September, 1865, with direction to take testimony and report the same to the court, and also whether the sale of the real estate in the bill mentioned would be to the interest of the infant defendant in said cause. The said auditor took depositions, and on September 27, 1865, submitted a report wherein he stated that Washington Berry had died in 1856, seized of the property, consisting of a large mansion and

410 acres of land, having by his will of the 28th of July, 1852, given the same, as well as portions of his personal property, to his wife for life for the education and support of their five daughters, the same to be kept as a home for them as long as they, or either of them should remain unmarried, and on the death or marriage of the last, his wife being dead, he directed the said estate to be sold and the proceeds divided among his said daughters, reserving the family burial ground to his heirs and urging some of his sons to purchase the homestead that it might be kept in the family. He further reported that the widow of said testator had shortly after his death discontinued her residence at the said homestead and removed with her family to the city of Washington and had since died; that all of said daughters had married except said Eliza T., who had not resided at said homestead since her mother left it, and had offered to give up her right of occupation so as to advance the period of sale directed by the testator. That said witnesses had described the property as being an unfit residence for the unmarried daughter and the land as being generally poor and unproductive as a farm and that the buildings and fences had become much out of order and repair, and that it would be to the interest of all the parties that it be sold and in parcels, and that all the devisees desired a sale and that none of the testator's sons was in a condition to become a purchaser; that it was a fit case for sale. That thereupon the court passed a decree directing that the said land with appurtenances be sold, and appointed John A. Middleton and Thomas W. Berry trustees to make such sale, and authorized them in their discretion to divide into parcels the said real estate and sell the same so divided, instead of as a whole, and on the final ratification of such sales and the payment of the purchase money to convey to the purchaser or purchasers in fee simple the property to him or her or them sold. That the trustees appointed by said decree divided said land into lots numbered from 1 to 36, inclusive, and made sale of certain of them at public auction to John McGuire in October, 1865, and subsequently, in 1868, upon the petition of Mary E. L. Johnson and Rosalie E. Berry, two of the defendants, stating that they had families and children to support and were in need of money which would come to them in case of a sale of said real estate, the court ordered the said trustees to sell the residue of said estate, and said trustees thereafter sold at public sale the remaining lots in said subdivision, the sales aggregating over \$100,000, all of which was subsequently ratified on, to wit, October 12, 1868, and the trustees authorized to convey said lots to the respective purchasers thereof. The names of the purchasers are then given. Among these appear sales to Eliza T. Berry, John A. Middleton, Rosalie E. Berry, A. Louise Berry, and Mary E. Johnson, all parties to said proceeding. That said deeds were duly recorded between the years 1866 and 1877, and that in the interval between this and the filing of this bill, the said Metropolis View was divided into hundreds of separate parcels, or holdings, with different owners, and is now so held. That all of said titles have been passed and approved without a question of doubt by all lawyers and title

companies engaged in examining and passing titles; that through said conveyances the complainant derived title to the parcels of land described in this bill, and he and those under whom he claims have for thirty-five years or more been in exclusive and continuous possession and control of the same, paying all taxes and assessments and relying upon the validity of their title, acquired bona fide for a valuable consideration, without notice or suspicion of the hostile or adverse claim now set up by the defendants.

The bill further avers that on the 1st day of August, 1906, the defendants herein, naming them, filed suit in the Supreme Court of the District of Columbia against certain other of the defendants herein, averring in substance, among other things, that in the year 1856 Washington Berry, grandfather of all the parties to said cause, departed this life seized and possessed of the tract of land known as Metropolis View; that he left surviving him as his sole heirs at law three sons and five daughters, naming the same; that he left a will containing the following clause:

"Item 5. It is my will and desire that my said homestead shall be kept and continued as the home and residence of my daughters so long as they shall remain single and unmarried. I therefore first after the death of my wife will and devise the said estate to my said daughters being single and unmarried and to the survivor and survivors of them so long as they shall be and remain single and unmarried, and on the death or marriage of the last of them I direct that the said estate shall be sold by my executors and the proceeds thereof be distributed among my daughters living at my death, and their children and descendants (per stirpes), and I hereby reserve to my heirs the family vault and burial ground embracing half an acre of ground around and having the said vault as a center and on such sale as aforesaid by my said executors I earnestly enjoin it on my sons or some of their sons to purchase the said homestead that it may be kept in the family."

A copy of said entire will is made an exhibit to the bill.

In the two first items of said will testator devised to each of his two sons in fee certain lands described therein, each being upon condition that the devisee shall execute deeds to his said daughters of certain lands devised to them by their grandfather. Item 3 devises another tract of land to his other son in fee. Another item is to the effect that, although in the devise hereinbefore made to the three sons the testator used words of inheritance, yet he expressly annexed to the estates so given to them this limitation, that if either of them shall die without leaving lawful issue, the estate of each one or both if more than one shall go to the survivor or survivors, his and their heirs. Item 4 gives the Metropolis View estate to his widow for life and also certain stocks and all rents and money on hand or which may be due on bonds, bills or notes, subject nevertheless the whole and every part of the said bequest to my said wife in the first place to the proper and comfortable support and maintenance and education, according to their condition and prospects, of my five daughters (naming them) so long as they and each of them remain single and unmarried, and upon their marriage and

birth of issue of each and every one of them respectively to pay and deliver to such one or more so married and having issue her just, full and equal one-sixth part of the personal estate so as aforesaid given to my said wife.

Item 5, heretofore copied, then follows.

Item 6 directs that the executors shall divide and distribute all the rest and remainder of the personal estate among the testator's children at his death and the descendants of such as may have died during his life to take a parent's part.

Item 7 provides for revoking every devise and bequest made to any one of his devisees or legatees who shall institute any action to set aside the will. Eliza T. Berry, wife, and W. L. Berry, son, were appointed executors. The will is dated July 28, 1852.

The said bill last referred to further averred that Eliza T. Berry, widow, died in 1864; that all of testator's daughters married except Eliza T. Berry, who never married, and died in March, 1903. Said bill then set out in detail the relationship of the parties to said cause to the said Washington Berry, showing complainants therein to be children of the daughters, other than Eliza T. Berry, of the said testator, and alleged that if the legal title to said property was vested in either the decedent, Eliza T. Berry, or the decedent, Washington L. Berry, said title is now vested in the parties to said cause, or some of them. The bill further alleged that under the terms of the will of testator, upon the death of Eliza T. Berry, the daughter of testator, the entire equitable interest in said real estate vested in fee simple in the complainants to said bill; that by court proceedings in the case of Middleton v. Berry, No. 500, heretofore referred to, said Middleton and another were appointed to sell said land, and through deeds executed by them, said land was attempted to be sold and conveyed to various persons, and all of said land is now held by persons claiming adversely to complainants. That when said bill was filed and said sales were made by said trustees, the complainants, Alexander D. Johnson, Elise Thomas Berry, John H. Berry, Leila T. Berry, Albert L. Berry and John A. Middleton, were in existence; that they were all minors and none of them were made parties to said suit, or in anywise represented therein. Complainants therefore averred that their rights and interests in said lands were not affected by the proceedings in said case or by the said sales, and they prayed for process and general relief, that a trustee might be appointed in place of said Eliza T. Berry and Washington L. Berry, named as executors in said will, and that the legal title vested in the parties to said last mentioned suit, or any of them, be transferred to such trustee to be appointed by decree of this court. The complainant in the present bill avers further, that on the 20th of February, 1907, a decree was passed in said equity cause No. 26464, appointing the defendants Thomas W. B. Middleton and Eugene Benton Berry trustees under the last will and testament of Washington Berry; that since the passing of said decree no further proceedings have been had in said cause or by said trustees to enforce any claim or demand they may have against this complainant by virtue of the said will and of said decree. That upon the proper

interpretation thereof, and the interpretation declared in said equity cause No. 500, and by virtue of the proceedings had therein and the conveyance made thereunder, a good and indefeasible title in fee simple to said real estate passed to and became vested in the purchaser from the said trustees John A. Middleton and Thomas W. Berry, and that said title passed by mesne conveyances and is now vested in the complainant to this suit. That complainant has also acquired and has a good and indefeasible title to said real estate by adverse possession; that no claim or demand has been made upon him or those under whom he claims in regard to his title to said real estate until the said equity suit No. 26,464 was brought by the said defendants hereto, and which is now pending in this court. That said claim, if it existed, was unknown to complainant. That the claims and averments contained therein create a cloud upon complainant's title and the menace of future litigation of such a public and notorious character that, although the same does not create *lis pendens*, as to complainant, it effectually prevents him from disposing of his property, either by sale or by encumbrance, and prevents examiners of titles from passing his title without mention of said pending cause. That the value of the land described in the bill is over \$5,000. Complainant further avers that he is advised that the construction given by the court in said equity cause No. 500 as to the effect of said will of Washington Berry to vest in his daughters living at his death the absolute interest in the proceeds of sale and the right to have advanced the time for sale and distribution, the prior purposes and trusts having been accomplished, and the construction given to wills containing similar provisions, by said court and others, established beyond question the validity of the titles derived through the aforesaid equity cause No. 500.

The prayer is that complainant's title be declared complete and perfect, and that the defendants, each of them, may be perpetually enjoined from asserting any title by sale or otherwise, or making any claim to or demand against said real estate, or any part thereof, as against said complainant, his heirs or assigns, and especially that the trustees aforesaid be restrained and enjoined from further proceedings, either in law or equity, or in any other manner, and from further asserting or claiming any right, title, or interest in and to the real estate described in complainant's bill.

As exhibits to said bill are filed the conveyance under which complainant claims, a transcript of the record in said equity cause No. 500 heretofore referred to, showing the order and decree therein, and the will of Washington Berry.

The answer to said bill admits the general facts alleged in the complainant's bill in regard to the will of Washington Berry, the names, ages, and conditions of his several children, and the proceedings set out in said bill. The answer further says that certain of the defendants were living at the time of the filing of the bill in said cause No. 500 and others have been born since, but avers that these defendants are advised that since none of them who were born before said equity proceeding No. 500 were made parties thereto, and since these defendants born and unborn at that time

were not in any wise represented in said equity cause No. 500, neither the decree made therein, nor any sale made in pursuance thereof, is of any effect against these defendants or any of them. They aver that upon the proper interpretation of the will of Washington Berry, they are the legal or equitable owners in fee of the real estate described in the bill, and that the proceeding in said equity cause, and the conveyance made by the trustees therein did not and do not in any wise affect the said title and ownership of defendants in said land. They admit the possession of complainant of the land, but they say that same was not adverse to them until May, 1903, because, while they had a legal or equitable interest in fee simple in said land, they had no right of entry until May, 1903, when said Eliza Thomas Berry, last survivor of the daughters of Washington Berry, died, never having been married. They admit that they did not themselves assert any interest or title in, or to any part of said land, until after the death of said Eliza Thomas Berry. They admit that they have a claim, and have asserted, and intend to assert, that they are the legal or equitable owners in fee of the land described in the bill of complainant, as well as of the whole of said Metropolis View tract. They admit that their claim is a cloud upon the title of complainant (if the complainant have any such title, which is denied), and that the complainant is thereby prevented from disposing of the property by sale or by encumbrance. They admit that the value of the land described in the bill is over \$5,000. They aver that the only reason the trustees appointed in said equity cause, No. 26,464, did not proceed at once to sell said tract called Metropolis View, was that several of the persons claiming parts of the same adversely to defendants were, and for a long time continued to be engaged in negotiation looking to the bringing of a test suit, or suits, to decide once and for all, and with as little expense and delay as possible, the proper construction of that paragraph of the will of Washington Berry under which these defendants claim title. Being so advised, they deny that the effect of said will was to vest in the daughters of Washington Berry the absolute interest in the proceeds of the sale of Metropolis View, and deny that said daughters or any of them had the right to have advanced the time for selling and distributing the proceeds under the terms of the will of Washington Berry.

After replication filed, testimony was taken. Complainant introduced the transcript of the records of the different equity suits described in the bill and of the proceedings therein, together with orders confirming the sales made by the trustees. He introduced testimony also of several officers of title insurance companies in the District of Columbia, who testified that they had passed the title to the said property on the ground that, under the construction of the will, item 5 vested an absolute title in the daughters of said Washington Berry and that the proceedings advancing the sale were regular and binding.

Defendants introduced proof, identifying the various defendants in the bill as descendants of the daughters of Washington Berry, all of whom are parties to the suit.

Before decree rendered, the complainant, Henry P. Sanders, died leaving a last will and testament, appointing the Washington Loan and Trust Company executor and trustee, and upon petition of said company, it was made a party complainant in place of said Henry P. Sanders, deceased, with right to prosecute said cause to final hearing and decree.

On hearing, the court granted the prayer of the bill ordering a perpetual injunction against the defendants, or any of them, from asserting any title, claim, or demand, against the said land. From that decree this appeal has been taken.

The determination of this case turns upon the construction of the will of Washington Berry, particularly the fifth item thereof, which reads as follows: "It is my will and desire that my said homestead shall be kept and continued as the home and residence of my daughters so long as they shall remain single and unmarried. I therefore first after the death of my wife will and devise the said estate to my said daughters being single and unmarried and to the survivor and survivors of them so long as they shall be and remain single and unmarried and on the death or marriage of the last of them then I direct that the said estate shall be sold by my executors and the proceeds thereof be distributed by my said executors among my daughters living at my death and their children and descendants (per stirpes) and I hereby reserve to my heirs the family vault and burial ground embracing half an acre of ground and having the said vault as a center and on such sale as aforesaid I earnestly enjoin on my sons or some of these sons to purchase the said homestead that it may be kept in the family."

The testator had three sons, to each of whom, in earlier items of said will, he devised certain lands in fee. The first two sons were required, as conditions precedent to the taking effect of said devises, to convey their interests in certain lands devised to them by their grandfather, to the testator's daughters "jointly to their heirs and assigns."

An unnumbered item following item 3 expressly annexed to the several estates devised to said sons, "this limitation that if either of them shall die without having lawful issue that the estate of each one or both if more than one shall go to the survivor or survivors his and their heirs."

Item 4 devised and bequeathed to testator's wife, for and during her natural life, the homestead estate of Metropolis View, certain stocks and all money in hand or due by bill, bond, note or otherwise, "subject nevertheless the whole and every part of the said bequest to my said wife in the first place to the proper and comfortable support and maintenance and education according to their conditions and prospects of my five daughters (naming them) so long as they and each of them shall remain single and unmarried and upon their marriage and birth of issue of each and every of them respectively to pay and deliver to each one or more so married and having issue her just, full and equal sixth part of the personal estate so as aforesaid given to my said wife."

Item 6 reads as follows: "I direct that my executors shall divide

and distribute all the rest residue and remainder of my personal estate among my children at my death and the descendants of such as may have died during my life to take a parent's part."

The will was executed in 1852, and testator died in 1856. All of the daughters survived him. One married but had no child prior to his death. After his death three other daughters married and all had children, who are the appellants in this case. Eliza Thomas Berry, the last daughter, was never married, and died in May, 1903. The widow and one of the sons were appointed executors of the will. She assumed the duties of executor; the son declined. The widow died in 1864.

The two principal contentions of the appellants are thus stated in their brief:

"1. Under the general rule relating to the construction of wills, to which all other rules are subordinate—that the plainly expressed intention of the testator is to be carried into effect, unless in conflict with some established rule of law—item fifth of the will of Washington Berry must be held to have vested an equitable fee simple in Metropolis View in the children of the daughters of Washington Berry, who were living when his last surviving daughter, Eliza Thomas Berry, died unmarried. 2. As there is in this will no direct gift by the testator to his daughters, nor even to trustees of that remainder for their benefit, but a mere provision that after the happening of certain events the property shall be sold and the proceeds of the sale paid to a certain class, or certain classes of persons, the remainder was not vested when he died, and those only take who were in existence when the precedent estate terminated."

The contention of the appellee, on the other hand, is: "The daughters of Washington Berry took under his will a life estate in Metropolis View to take effect in possession upon the death or determination of the life estate of their mother, Eliza T. Berry, therein, to terminate on their marriage; and, also, at the death of testator, a vested remainder in fee, to take effect in possession on the marriage of all of them, or the death of the last unmarried daughter."

The following definitions of vested and contingent remainders are given in the opinion of Mr. Justice Swayne, in *Doe v. Considine*, 6 Wall., 458, 474: "A vested remainder is where a present interest passes to a certain and definite person, but to be enjoyed in futuro. There must be a particular estate to support it. The remainder must pass out of the grantor at the creation of the particular estate. It must be in the grantee during the continuance of the estate or eo instante that it determines. A contingent remainder is where the estate in remainder is limited either in a dubious or uncertain person, or upon the happening of a dubious and uncertain event."

Undoubtedly, as declared in *Smith v. Bell* (6 Pet., 68, 75), the first and great principle in the exposition of wills, to which all other rules must bend, is that the intention of the testator expressed in his last will shall prevail, if not inconsistent with settled rules of law.

We do not find in the words of the testator such a clear and certain expression of his intention as to enable us to determine between

the several contentions of the parties, before stated, without the aid of certain established rules of construction applicable in case of uncertainty. These are: 1. The law will not construe a remainder to be contingent when it can be taken to be vested. 2. Estates shall be held to vest at the earliest possible period, unless there is a clear manifestation of the intention of the testator to the contrary. 3. Adverbs of time, as where, there, after, from, etc., in a devise of a remainder are construed to relate merely to the time of the enjoyment of the estate, and not the time of vesting in interest. *Doe v. Considine*, 6 Wall., 458, 475; *McArthur v. Scott*, 113 U. S., 340, 378, 380; *O'Brien v. Dougherty*, 1 App. D. C., 148, 157; *Richardson v. Penicks*, *Idem*. 261, 264; *Hauptman v. Carpenter*, 16 App. D. C., 524, 528.

Applying these rules, we are of the opinion that by the provisions of the fifth item of the will the daughters of the testator, who were all living at his death, took a vested interest in the Metropolis View farm, to come into possession and enjoyment upon the termination of the life estate of the wife and the death of the last surviving daughter unmarried. The direction for sale and distribution among the daughters "living at my death" fixes that as the time of the vesting of the right in the said daughters.

It is argued by the appellants that, under this view, a daughter who might predecease the testator would take nothing, a result which, it is said, ought not to be considered as within the intention of the testator. And it was further said that if a contingent remainder was to be created in the children and descendants of daughters, those words would limit it to the children and descendants of daughters who might be living at the time of the testator's death, and thus cut off the children and descendants of any daughter who might have married after the date of the will, and then died before the testator, having a child or children. On the ground that neither of these results could have been within the intention of the testator, it is argued that the words "living at my death" must be eliminated and given no weight. There are no grounds, however, for eliminating words which indicate a particular intent, unless, at least, they can be shown to be utterly inconsistent with a primary or general intention otherwise clearly manifested. If any such primary intention can be said to be shown in the will it would seem to be that expressly manifested in the sixth item, and indicated more or less in others, namely, that the interests devised and bequeathed should vest in the daughters living at his death, the children of one dying in the meantime to be substituted for the deceased parent. We do not think that the language of the clause in item 5, "I therefore first after the death of my wife will and devise the said estate to my said daughters," etc., can be held to mean that there was no intention to vest an immediate estate in the daughters, or that the vesting of any estate was postponed until after the death of the wife.

For that reason, the cases cited by appellants, to the effect that where the only gift is a direction to pay a fund at some future time, or is to trustees to sell and distribute the proceeds after the happening of a certain event—that is to say where the *the* time or

event referred to in the future is of the substance, and a condition of the gift—do not apply. As we have seen, the settled rule is that estates shall be held to vest at the earliest possible period unless there be a clear manifestation of the intention of the testator to the contrary. And also that adverbs of time like "after," the word used, are ordinarily construed to relate to the time of the enjoyment of an estate and not to the time of vesting in interest, unless there are other terms clearly indicating a different intention. Similar words to those of the testator are frequently found in wills. The language here used is not substantially different from that involved in the case of *Hauptman v. Carpenter*, 16 App. D. C., 524, 526, 529. In that case the will of Daniel Hauptman devised a life estate to three of his numerous children subject to be defeated by marriage; the interest of one marrying to become vested in the unmarried survivor or survivors. The next paragraph provided that: "After the death of all my aforesaid named children, I give, devise and bequeath all of my aforesaid real estate and personal property to my son, Francis E. Hauptman upon the trusts following, to sell" etc., and distribute the proceeds among testator's children and their respective descendants if they or any of them are dead, etc. The three life tenants died unmarried, one of them only before Francis E. Hauptman, who died leaving no issue. It was held that Francis E. Hauptman took a vested estate which passed under his will. It was said: "Tested by the definitions heretofore given of vested and contingent remainders, it would seem that the devises made by the will of Daniel Hauptman fully satisfy all of the conditions of the former; and we find nothing in the remaining provisions clearly manifesting an intention to create a different estate. . . . That the estate is ordered to be sold and the proceeds divided after the determination of the life estate, thereby working an equitable conversion of the estate or interest in remainder, is of no importance in determining the character of that remainder." See, also, *Cropley v. Cooper*, 19 Wall., 167, 174.

In that case the will provided that Elizabeth Cropley should have an estate for life in certain land; "and at her decease it is my will that the said land be sold, and the avails therefrom become the property of her children or child, when he, she or they have arrived at the age of twenty-one years, the interest in the meantime to be applied to their maintenance." This last item, of importance in one aspect of the case, has no particular bearing on the point now under consideration because this right to maintenance could not accrue until at the death of the life tenant. The court said: "A bequest in the form of a direction to pay at a future period vests immediately if the payments be postponed for the convenience of the estate or to let in some other interest. The payment of debts is an instance of the former, and a prior temporary provision for some other person, as for Elizabeth Cropley, in this case, is an instance of the latter. In all such cases it is presumed that the testator postponed the time of enjoyment of the ultimate legatee for the purpose of the prior devise or bequest. A devise of lands to be sold after the termination of a life estate given by the will, the proceeds to be distributed thereafter

to certain persons, is a bequest to those persons and vests at the death of the testator."

In view of the decisions that have been referred to, which declare the law in this jurisdiction, it would serve no useful purpose to review the many cases cited by both parties in support of their respective contentions.

Having concluded that the daughters of the testators took a vested remainder in the Metropolis View homestead, there is no occasion to consider the power of the equity court, exercised in October 1865, to advance the time of the sale of the same, upon the petition of the parties interested, to a time preceding the death of the unmarried daughter, who waived her right, and consented thereto.

The parties obtaining the benefit of that decree would be estopped to impeach it in any event; and the appellants have no right, title, or interest to furnish a foundation for their impeachment.

We think the third point of the appellants is embraced in the conclusions enounced.

There was no error in the decree granting the prayer of the appellee's bill, and it will be affirmed with costs.

Affirmed.

WEDNESDAY, *April 7th*, A. D. 1909.

April Term, 1909.

No. 1900.

ALEXANDER D. JOHNSON, ELISE THOMAS BERRY, LOUISE Y. B.
DUVALL, IMOGENE BERRY TUBMAN, et al., Appellants,
vs.

THE WASHINGTON LOAN AND TRUST COMPANY.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. CHIEF JUSTICE SHEPARD.

APRIL 7, 1909.

In the Court of Appeals of the District of Columbia, April Term,
1908.

No. 1900.

ALEXANDER D. JOHNSON, ELISE THOMAS BERRY, LOUISE Y. B.
DUVALL, IMOGENE BERRY TUBMAN, et al., Appellants,

vs.

THE WASHINGTON LOAN AND TRUST COMPANY.

The appellants move the court to grant a rehearing of this case for the following reason:

The court in its opinion affirming the decree of the Supreme Court of the District of Columbia has stated what it terms in its opinion "the two principal contentions of the appellants as thus stated in their brief."

The contentions which follow this sentence in the opinion do not embrace, or in anywise refer to, the point numbered III in the brief filed in this Court by counsel for the appellants, said point being one upon which counsel for the appellant in their brief and in the oral argument placed as much reliance as upon any other point in the case.

The following is a copy of so much of said brief on behalf of the appellants as relates to said point III:

III.

Even if the interest of the daughters of the testator vested at his death yet that interest was subject to be divested as to any of the daughters who should die leaving "children or descendants" before the time fixed for sale and distribution.

The rule here referred to is thus stated in Page on Wills, section 656:

"There is, however, a large class of cases which some courts class as vested and others as contingent. These are cases where there are in existence persons, who, by the terms of the gift, could take if the particular estate were to determine at once, but who may, by conditions subsequent, be incapable of taking if the particular estate should determine at a future time. In this class of cases the usual contingency inserted is either an express or implied provision that any of the beneficiaries who die before determination of the particular estate shall thereby be divested of all their interest in remainder, and that subsequently born beneficiaries may take; as where the estate is given to one for life and upon his death to such of his children as may be alive at the death of the life tenant. It is, in such cases, impossible to determine who the beneficiaries will be, until the particular estate determines. In cases like this, some authorities call the interest of the children a vested interest, subject to be divested by a condition subsequent."

The same principle is thus stated in 24 Eng. & Am. Enc. (2 ed.), 392:

"Intention governs. But it is in all cases the intention as expressed in the instrument creating the expectant estate that is to govern, and therefore, if the language employed shows an intention to postpone the vesting until the happening of a certain event, it is contingent. If, on the other hand, the language shows an intention that such an interest shall vest at once, subject to a divesting contingency, then the remainder is vested."

24 Eng. & Am. Enc. (2 ed.), 392.

In *Underhill on Wills*, sec. 350, p. 470, the author refers to the English cases breaking down the rule that survivorship is held to refer to the time of the testator's death, and adds:

"The first step by way of breaking down the rule was made where the future gift was not of land, but of money which was to be the proceeds of land expressly directed to be sold upon the death of a life tenant who had the gift of its income, the proceeds to be then distributed. Here the property which is to be distributed is not in a condition to be divided as directed by the testator until the death of the life tenant, and hence only those who survive him can take."

This construction has been given to devises of remainders by the Supreme Court of the United — in two noted cases.

In *Doe v. Considine*, 6 Wallace, 458—one of the cases, relied upon by adverse counsel here—Mr. Justice Swayne, after saying that in certain cases a remainder vests in interest as soon as the remainderman is in esse and ascertained, adds at page 476:

"Yet if the estate is limited over to another in the event of the death of the remainderman before the determination of the particular estate, his vested estate will be subject to be divested by that event, and the interest of the substituted remainderman, which was before either an executory devise or a contingent remainder, will, if he is in esse and ascertained, be immediately converted into a vested remainder."

So, in *MacArthur v. Scott*, 113 U. S., 340, Mr. Justice Gray, at page 381, after referring to certain gifts in the will in that case as being vested in grandchildren, says that the only effect of another provision that if a grandchild should die before distribution the children of such grandchild should take in his or her place, was "to divest the share of any grandchild deceased leaving issue, and to vest that share in such issue."

And there are innumerable cases in State courts of the highest standing holding that while a will may give an interest in real estate in remainder which vests immediately upon the death of the testator, that interest may be subject to be taken away altogether by events happening before the determination of the particular estate. A few of these cases follow.

Property was devised to trustees to pay the income to testator's widow for life, and on her death to pay over the same to the testator's children, the issue of any deceased child "to stand in their parent's stead and receive their parent's share."

It was held that the children took a vested interest, subject to be divested by their dying before their mother. Accordingly the

executors were not allowed credit for a sum paid to a child who did not survive his father, but the children of such child were held entitled to his share of the estate.

The court said:

"The testator's clear intention was to postpone the possession and enjoyment of the estate by his children until the death of the widow, so that Dwight B. Hooper had no right of possession or enjoyment of any part of his share during his mother's life. It is not a reasonable construction of the clause we are considering, that the words 'the issue of any deceased child' refer only to the issue of any child who died before the testator. He is speaking of the time of the decease of the widow, the time of the final distribution of the property, and the meaning is the same as if he had said 'at her decease the trustees are to convey the property to and among my children in equal proportions; but if any child be then deceased, leaving issue, such issue are to take the share their parent would have taken if then living.'

"It was the intention of the testator, not merely to postpone the enjoyment to the period of distribution, but to create a condition subsequent, that if any child died before the widow, leaving issue, such issue should take under the will as substituted legatees. The case falls within that class of cases where it is held that a devise creates a vested interest determinable by some future condition or contingency. *Blanchard v. Blanchard*, 1 Allen, 223, and cases cited. *McArthur v. Scott*, 113 U. S., 340. Dwight B. Hooper took a vested estate liable to be divested and defeated if he died before his mother, leaving issue. He could assign it, but his assignee would take the estate subject to the same contingency. *Putnam v. Story*, 132 Mass., 205. *Dunn v. Sargent*, 101 Mass., 336. Neither he nor the trustees could enlarge his interest, or defeat the interest of his issue. In the contingency which has happened, they are entitled under the will to that share of the principal of the fund which would have come to their father, if he had survived his mother. If the trustees purposely or negligently allowed Dwight B. Hooper to appropriate a part of this fund, it was a breach of trust, and they cannot charge it in their account against his children, thus defeating their rights and the intentions of the testator."

Dodd v. Winship, 144 Mass., 461.

Devise to daughter of testatrix for life, then to her children should she leave any, if not, over to a church, subject to power to executors to sell three lots during the lifetime of the daughter—"Whatever may be left if any shall be given to and divided among her children share and share alike, the children of a deceased child to take the share of a parent."

All seven of the judges held that a purchaser could not be required to take a title which covered the interests of the life tenant (who was over seventy-four) and her children and the church, on the ground that although the general rule is that a devise of a life estate with remainder over on the death of the life tenant gives the remainderman a vested interest, the language of this particular will showed a contrary intention. And four of the judges held

that even if the interest of the children was vested, it was subject to be divested should they die during the life of the widow leaving children, for by the terms of the will the grandchildren would then take, and the rights of unborn persons could not be cut off otherwise than by judicial proceedings.

Hebberd v. Lease, 107 App. Div., 425 (1905).

Devise of residue to testator's daughter. If she died leaving a child or children, then to them—if she should die leaving a husband and no children, one-third to the husband, the other two-thirds over. There was no provision for the case of her dying without leaving either husband or children.

A majority of the Court held that the daughter took a fee, subject to be divested if she should die after marrying, leaving a child or a husband.

Two of the judges held that as she did not marry there was an intestacy as to the remainder after her life estate.

Morehouse v. Morehouse, 33 App. Div., 250.

Devise to trustees during daughter's life, then to such grandchildren as shall then be living, but if any of the said seven grandchildren should die before the daughter, the children of such deceased grandchildren to take their parent's share.

It was held that each of the grandchildren took a vested interest, subject to be divested by his or her death (with or without issue) before the daughter died.

Two of the five judges dissented on the ground that the vested remainder of a grandchild would be divested only in the event of his dying *with* issue surviving him.

Cochrane v. Kip, 19 App. Div., 272.

By his will a testator authorized his executors to partition, divide and apportion his residuary estate among his children living at the time of such partition and the issue of any child or children who had died leaving issue. There was an express provision that if any child should die leaving issue, then the child or children (living at the time of partition) of such deceased child should take in the parent's place.

This last clause was held void under a New York statute, but the rest of the will stood. It was determined that the testator's children took a vested interest, subject to be divested by death before partition completed.

Henderson v. Henderson, 113 N. Y., 1, 14.

Devise to two of testator's children, with the provision that "should either die without heirs capable of inheriting" his share should go to the survivor.

Held to give them an estate in fee determinable by contingency of death without children.

Durfee v. McNeil, 58 Ohio St., 238.

Devise in trust for wife for life, then to testator's surviving children. It was held that this by itself would be construed as a gift to those of the children who should survive the widow. But other clauses of the will clearly showed that the testator intended the shares of his children to vest on his death and it was so held.

A further clause provided that on the death of any child his share was to go to the surviving children. This was construed to give a vested estate to each child, liable to be divested by his death before the period of distribution.

Boggs v. Boggs, 60 Atl. Rep., 1114 (New Jersey Ch., 1905).

A devise to grandchildren, with provision that if any of them should die after marriage, and without leaving a child, their interest should go over, was held to create a fee in the grandchildren, subject to be divested if the grandchild should die childless.

Hill v. Terrell, 123 Ga., 49.

A devise to sons in remainder, with provision that if either of them should die without issue their portion should go to the survivors or their heirs, gives each of the sons an estate in fee, subject to be divested upon his death without issue.

Daniel v. Daniel, 102 Ga., 181.

Devise to grand-daughter, with remainder over to testator's children, in case she should die without issue.

Held to give the devisee a fee subject to be divested on her death without law.

Louisville Trust Co. v. Maddox, 44 S. W. Rep., 632.

Devise in trust to apply income to support of testator's daughter and on her death without issue to pay two-thirds of the principal to certain nephews. If she died leaving issue they were to receive the fund.

It was held that the nephews took a vested interest subject to be divested by the death of the daughter leaving issue.

"The contingency did not affect the vesting of the interest given. It was a possible event provided for by the testator which should operate to divest those interests. It was not a gift limited to take effect upon an uncertain event. It was a gift which the uncertain event might chance to defeat."

Stringer v. Young, 83 N. E. Rep., 690 (Court of Appeals N. Y., Feb'y 18, 1908).

Devise to trustee for benefit of testator's children "to be held in trust by the said (trustee) for their sole and separate use upon the following condition and limitation: that is to say if either of my children now in life or hereafter born should die without issue living at the time of their death," then, &c.

"Held, that the estate created for the benefit of the testator's

daughters was one in fee, subject to be divested upon the happening of the contingency specified."

Maynard v. Greer, 59 S. E. Rep., 798 (Ga., Dec., '07).

The foregoing case follows an elaborate opinion by Lumpkin, Justice, in—

Hill v. Terrell, 123 Ga., 49.

If the court should decline to grant a rehearing of the case, the appellants respectfully request the court to so amend its opinion in the case that it will appear of record that the foregoing proposition of law was duly presented to it by counsel for the appellants.

A. S. WORTHINGTON,
Attorney for Appellants.

(Endorsed:) No. 1900. Alexander D. Johnson, et al. v. Washington Loan & Trust Co. Motion for rehearing. Court of Appeals, District of Columbia. Filed Apr. 19, 1909. Henry W. Hodges, Clerk.

MONDAY, April 19th, A. D. 1909.

No. 1900.

ALEXANDER D. JOHNSON, ELSIE THOMAS BERRY, LOUISE Y. B. DUVALL, IMOGENE BERRY TUBMAN, et al., Appellants,
vs.

THE WASHINGTON LOAN AND TRUST COMPANY.

The motion for a rehearing in the above entitled cause was submitted to the consideration of the Court by Mr. A. S. Worthington of counsel for the appellants.

TUESDAY, April 20th, A. D. 1909.

No. 1900.

ALEXANDER D. JOHNSON, ELSIE THOMAS BERRY, LOUISE Y. B. DUVALL, IMOGENE BERRY TUBMAN, et al., Appellants,
vs.

THE WASHINGTON LOAN AND TRUST COMPANY.

On consideration of the motion for rehearing in the above entitled cause, It is by the Court this day ordered that said motion be, and the same is hereby, overruled.

TUESDAY, April 20th, A. D. 1909.

No. 1900.

ALEXANDER D. JOHNSON, ELSIE THOMAS BERRY, LOUISE Y. B. DUVALL, IMOGENE BERRY TUBMAN, et al., Appellants.

vs.

THE WASHINGTON LOAN AND TRUST COMPANY.

On motion of A. S. Worthington, of counsel for the appellants in the above entitled cause, It is ordered by the Court that said appellants be allowed an appeal to the Supreme Court of the United States, and the bond for costs is fixed at the sum of three hundred dollars.

(Bond on Appeal.)

Know all men by these presents, That we, Alexander D. Johnson, Elise Thomas Berry, Louise Y. B. Duvall, Imogene Berry Tubman, Eugene Benton Berry, John H. Berry, Claude Nathaniel Berry, Leila T. Berry, Frederick B. Berry, Albert L. Berry, John A. Middleton, David L. Middleton, Washington B. Middleton, Thomas W. B. Middleton, as principals, and John B. N. Berry, as surety, are held and firmly bound unto The Washington Loan and Trust Company in the full and just sum of Three hundred (\$300.00) dollars, to be paid to the said The Washington Loan and Trust Company, etc., certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 28th day of April, in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between said Alexander D. Johnson, Elise Thomas Berry, Louise Y. B. Duvall, Imogene Berry Tubman, Eugene Benton Berry, John H. Berry, Claude Nathaniel Berry, Leila T. Berry, Frederick B. Berry, Albert L. Berry, John A. Middleton, David L. Middleton, Washington B. Middleton, Thomas W. B. Middleton, and said The Washington Loan and Trust Company, and numbered 1900 on the docket of said Court a decree was rendered against the said above mentioned obligors and the said above mentioned obligors having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said The Washington Loan and Trust Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said above mentioned obligors shall prosecute said appeal to effect, and answer all costs if they fail to make their plea good, then the

above obligation to be void; else to remain in full force and virtue.

EUGENE BENTON BERRY.	[SEAL.]
FREDERICK B. BERRY.	[SEAL.]
ALEXANDER D. JOHNSON,	[SEAL.]
ELISE THOMAS BERRY,	[SEAL.]
LOUISE Y. B. DUVALL,	[SEAL.]
IMOGENE BERRY TUBMAN,	[SEAL.]
JOHN H. BERRY,	[SEAL.]
CLAUDE NATHANIEL BERRY,	[SEAL.]
LEILA T. BERRY,	[SEAL.]
ALBERT L. BERRY,	[SEAL.]
JOHN A. MIDDLETON,	[SEAL.]
DAVID L. MIDDLETON,	[SEAL.]
WASHINGTON B. MIDDLETON,	[SEAL.]
THOMAS W. B. MIDDLETON,	[SEAL.]
By A. S. WORTHINGTON,	[SEAL.]
<i>Their Attorney.</i>	
JOHN B. N. BERRY.	[SEAL.]

Sealed and delivered in presence of—

G. B. N. BERRY,
As to Eugene Benton Berry.
 WILLIAM K. QUINTER,
As to Frederick B. Berry.
 WILLIAM K. QUINTER,
As to John B. N. Berry.

Approved by

CHAS. H. ROBB,
*Associate Justice Court of Appeals
 of the District of Columbia.*

I consent to the approval of this bond.

B. F. LEIGHTON.

[Endorsed:] No. 1900. Alexander D. Johnson, Elise Thomas Berry, Louise Y. B. Duvall, Imogene Tubman, et al., Appellants vs. The Washington Loan and Trust Company. Bond on appeal to Supreme Court of the United States. Court of Appeals, District of Columbia. Filed Apr. 28, 1909. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, ss:

To The Washington Loan & Trust Company, a body corporate,
 Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's office of the Court of Appeals of the District of Colum-

bia, wherein Alexander D. Johnson, Elsie Thomas Berry, Louise Y. B. Duvall, Imogene Berry Tubman, Eugene Benton Berry, John H. Berry, Claude Nathaniel Berry, Leila T. Berry, Frederick B. Berry, Albert L. Berry, John A. Middleton, David L. Middleton, Washington B. Middleton, Thomas W. B. Middleton, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Chas. H. Robb, Associate Justice of the Court of Appeals of the District of Columbia, this 28th day of April, in the year of our Lord one thousand nine hundred and nine.

CHAS. H. ROBB,

*Associate Justice of the Court of Appeals
of the District of Columbia.*

Service accepted April 28, 1909.

B. F. LEIGHTON,

Counsel for Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 28, 1909. Henry W. Hodges, Clerk.

No. 1900.

ALEXANDER D. JOHNSON, ELISE THOMAS BERRY, LOUISE Y. B. DUVALL, IMOGENE BERRY TUBMAN, et al., Appellants,

vs.

THE WASHINGTON LOAN AND TRUST COMPANY.

Designation of Record on Appeal to the Supreme Court of the United States.

In preparing the transcript of record on appeal to the Supreme Court of the United States, the Clerk will please include therein the following papers, namely:

1. The record.
2. The argument.
3. The opinion.
4. The decree.
5. The motion for rehearing and its submission and the order overruling the same.
6. The order allowing appeal to the Supreme Court of the United States.
7. The bond on appeal.
8. The citation.
9. And this designation.

A. S. WORTHINGTON,

Counsel for Appellants.

(Endorsed:) No. 1900. Alexander D. Johnson, et al., Appellants, vs. The Washington Loan and Trust Company. Designation of Record on Appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Apr. 29, 1909. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 95 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals, in the case of Alexander D. Johnson, Elise Thomas Berry, Louise Y. B. Duvall, Imogene Berry Tubman, et al., Appellants, vs. The Washington Loan & Trust Company, No. 1900, April Term, 1909, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 28th day of April, A. D. 1909.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,

Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 21,636. District of Columbia Court of Appeals. Term No. 209. Alexander D. Johnson, Elsie Thomas Berry, Louise Y. B. Duvall, et al., appellants, vs. The Washington Loan & Trust Company. Filed April 29th, 1909. File No. 21,636,

**IN THE
SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1911.

No. 40.

ALEXANDER D. JOHNSON ET AL., APPELLANTS,

vs.

WASHINGTON LOAN & TRUST COMPANY.

BRIEF FOR APPELLANTS.

Statement of the Case.

The original bill in this case was filed by Henry P. Sanders against the appellants and others for the purpose of quieting the title to a parcel of land in the District of Columbia, outside of the city of Washington, of which Sanders was in possession when the bill was filed. During the litigation Sanders died, and the Washington Loan and Trust Company has taken his place as devisee under his will.

One Washington Berry died in 1856, owning a tract of land in the District of Columbia, known as Metropolis View, of which the parcel involved in this suit was a part. He

left a will, which was duly admitted to probate in the Orphans' Court of the District of Columbia, a copy of which appears twice in the record (15, 32).

The main question in this case is as to the proper construction of "Item 5th" of that will, which is to be taken in connection with the preceding paragraph, "Item 4th." Those two items read as follows:

"Item 4th. I give devise and bequeath to my dear wife Eliza T. Berry if she should survive me for and during her natural life the Homestead estate on which I now reside called Metropolis View, containing four hundred and ten acres also all my stocks in the Corporation of the City of Washington also all my stocks in the debt of the State of Maryland also all and **whatsoever other stocks I may have at my death** in any state or corporation and all rents and all the money I may then have on hand or which may be due me on bond, bill or notes otherwise, subject nevertheless the whole and every part of the said bequest to my said wife in the first place to the proper and comfortable support and maintenance and education according to their condition and prospects of my five daughters Anna Maria, Eliza Thomas, Amelia Owen, Mary Elizabeth Louisa and Rosalie Eugenia Berry so long as they and each of them remain single and unmarried and upon their marriage and birth of issue of each and every of them respectively to pay and deliver to such one or more so married and having issue her just, full and equal sixth part of the personal estate so as aforesaid given to my said wife.

"Item 5th. It is my will and desire that my said homestead shall be kept and continued as the home and residence of my daughters so long as they shall remain single and unmarried. I therefore first after the death of my wife will and devise the said estate to my said daughters being single and unmarried and to the survivor and survivors of them so long as they shall be and remain single and unmarried *and on the death or marriage of the last of them then I direct that the said estate shall be sold by my executors and the proceeds thereof be distributed by*

my said executors among my daughters living at my death and their children and descendents (per stirpes) and I hereby reserve to my heirs the family vault and burial ground embracing half an acre of ground and having the said vault as a centre and on such sale as aforesaid by my executors I earnestly enjoin on my sons or some of their sons to purchase the said homestead that it may be kept in the family."

The will was executed in July, 1852, four years before the testator's death. At that time he had five daughters and three sons living, all of whom, together with his wife, survived him, one of the daughters only having married up to the time of his death, and that one when he died having no children. After his death, three others of the daughters married and all the married daughters gave birth to children.

One of the daughters, Eliza Thomas Berry, who never married, survived all her sisters. She died in May, 1903 (67).

On August 28, 1865, after the death of the widow, a suit in equity (known as Equity, No. 500) was begun in the Supreme Court of the District of Columbia for the purpose of having the Metropolis View property sold. All the children of Washington Berry and the husbands of his four married daughters (as well as the wives of two of his sons) were parties to this suit, either as complainants or as defendants. Three grandchildren by the daughters were living at this time, but none of them was made a party to the proceeding, nor were the grandchildren by the daughters in any way represented. (The sons were made parties doubtless because of their interest in the family burying ground which was not devised to anybody). The bill of complaint in that case will be found on page 13 of the record, and the answers filed by the several defendants will be found on pages 18, 19, 24, 25, 26, and 27.

Pursuant to the prayer of the bill, and by consent of all

the parties, plaintiffs and defendants, trustees to sell Metropolis View were appointed. Thereafter these trustees subdivided the property into 36 lots and conveyed all the lots to various persons. Sanders' title is derived through these trustees.

In 1906, after the death of Eliza T. Berry, the children of the four daughters of Washington Berry filed a bill in equity in the Supreme Court of the District against the children of his sons, averring that upon the death of Eliza T. Berry (in 1903) they became entitled to have Metropolis View sold and to have the proceeds of the sale distributed among them, but that owing to the death of the executors who had the power of sale they were compelled to apply to a court of equity for relief. They asked for the appointment of trustees to sell. After due proceedings, the court in that suit—No. 26,464, in equity—on February 20, 1907, appointed trustees accordingly. Shortly afterward Sanders filed the original bill in this suit, seeking to enjoin the plaintiffs in cause No. 26,464, and the trustees appointed in that case, from proceeding to have the property sold or from otherwise disturbing Sanders in the possession of the land involved.

In their answers in this case the defendants claimed that by the proper construction of Item 5th of the will of their grandfather, Washington Berry, upon the death of his last surviving daughter unmarried they became the equitable owners in fee of Metropolis View.

A replication to the answer was duly filed and some depositions were taken on behalf of Sanders. In the view of appellants' counsel, these depositions relate to entirely immaterial matters. They consist wholly of the testimony of several more or less interested title examiners as to the opinions entertained in reference to the proper construction of the will of Washington Berry by themselves and some of their associates. On behalf of the appellants, evidence was taken (61-64) to prove that they are, as they claim to be,

the children of the four married daughters of Washington Berry, and therefore the only persons interested in the real estate involved in this suit, if the complainant, Sanders, was not the owner under the title derived through the sale made in equity case No. 500.

Upon final hearing in the Supreme Court of the District of Columbia before Mr. Chief Justice Clabaugh, he sustained the contention of the appellee as to the construction of Item 5th of Washington Berry's will, and accordingly signed a decree enjoining the appellants from setting up any claim as to the real estate involved in the suit (71).

All the defendants in the case, except those against whom a decree *pro confesso* was taken (and who did not have and do not claim to have any interest in Metrópolis View) united in taking the case to the Court of Appeals of the District of Columbia. That court affirmed the decree of the Supreme Court of the District. The opinion of the Court of Appeals was delivered by Chief Justice Shepard, and will be found on pages 73 to 84 of the record.

It will be seen that the Court of Appeals held that upon the death of the testator, Washington Berry, the title to the real estate described in Item 5th of his will vested in fee in his five daughters, subject only to the life estate of his widow, and that as the equity suit No. 500 above referred to was not begun until after the death of the widow, the sales made pursuant to the decree in that case carried to the purchasers all the interest in that real estate that Washington Berry had when he died. In other words, it was held because none of the children of any of the four daughters who married and had children was born till after Washington Berry's death, they took no interest in the real estate in question under his will.

An appeal from the final decree of the Court of Appeals was duly taken to this court.

Assignments of Error.

The Court of Appeals of the District of Columbia erred:

I.

In holding that under Item 5th of the will of Washington Berry his five daughters took an absolute fee simple interest in the real estate referred to in that item subject only to the life estate of his widow, said item being as follows:

"Item 5th. It is my will and desire that my said homestead shall be kept and continued as the home and residence of my daughters so long as they shall remain single and unmarried. I therefore first after the death of my wife, will and devise the said estate to my said daughters being single and unmarried and to the survivor and survivors of them so long as they shall be and remain single and unmarried and on the death or marriage of the last of them then I direct that the said estate shall be sold by my executors and the proceeds thereof be distributed by my said executors among my daughters living at my death and their children and descendants (*per stirpes*) and I hereby reserve to my heirs the family vault and burial ground embracing half an acre of ground and having the said vault as a centre and on such sale as aforesaid by my executors I earnestly enjoin on my sons or some of their sons to purchase the said homestead that it may be kept in the family."

II.

In holding that purchasers of said real estate under sales made pursuant to the final decree in said equity cause No. 500 took all the interest which at the time of his death said Washington Berry had in said real estate, notwithstanding the fact that when the bill in that case was filed and when said decree was made there were living children of two

of the daughters of said Washington Berry who still survive, none of whom was made a party to the suit.

III.

In not holding that upon the death, unmarried, in May, 1903, of Eliza Thomas Berry, the last survivor of the five daughters of Washington Berry, the children of the other four daughters became entitled to the real estate referred to in said Item 5th of said will or to the proceeds of the sale of such real estate to be made pursuant to said Item 5th.

IV.

In affirming the action of the Supreme Court of the District of Columbia in this case enjoining the appellants, Alexander D. Johnson, Eliza Thomas Berry, Louise Y. B. Duvall, Imogene Berry Tubman, Eugene Benton Berry, Claude Nathaniel Berry, Leila T. Berry, Frederick B. Berry, Albert L. Berry, John A. Middleton, David L. Middleton, Washington B. Middleton, Thomas W. B. Middleton, Washington L. Berry, Tiernan B. Berry, William F. Berry, Thomas O. Berry, Maria Hughes Kennedy, Adelaide Savage Mealey, Lillie C. Bowie, Henry A. Berry, Edward L. Berry, and Martha A. Berry, and John H. Berry, now deceased, from asserting any title against said real estate or any part thereof as against the appellee, its successors and assigns and particularly in enjoining Thomas W. B. Middleton and Eugene Benton Berry, the trustees appointed in equity cause No. 26,464, in the Supreme Court of the District of Columbia, from further proceedings either at law or in equity or from in any manner or form asserting or claiming any interest in and to said real estate.

V.

In not remanding this case to the Supreme Court of the District of Columbia with instructions to dismiss the bill of complaint.

ARGUMENT.

I.

THE CONSTRUCTION OF THE WILL.

The Intention of the Testator.

The foregoing several assignments of error raise but two questions: (1) As to the proper construction of the following words in Item 5th in the will of Washington Berry:

“On the death or marriage of the last of them [the testator’s five daughters] then I direct that the said estate shall be sold by my executors and the proceeds thereof be distributed by my said executors among my daughters living at my death and their children and descendants (*per stirpes*),”

and (2) as to the effect as against these appellants of the decree in equity cause 500.

On behalf of the appellants it is contended that by the words above quoted from their grandfather’s will he meant that the proceeds of the sale which he directed to be made should be distributed among his daughters and their children and descendants as those classes should exist when all of the daughters should be dead or married. The appellee contends on the other hand that the testator meant that the proceeds of the sale should be divided among his daughters and their children or descendants as those classes existed at the time of his death; and that as none of his daughters had any children at that time the daughters took the entire remainder after the termination of the life estate of the widow of the testator.

Although in his brief in this court counsel for the appellee concedes that where the intention of a testator is plain so-called “rules of construction” are not to be resorted to for

the purpose of determining that the testator did not mean what he has said in his will, his brief is largely devoted to an effort to satisfy the court that the testator in this case did not mean what he said. For this reason some emphatic expressions of courts of last resort on this subject are here referred to:

In the case of *Clarke ex. Boorman's Executors*, 18 Wall., 502, Mr. Justice Miller, in delivering the opinion of the court, said:

"Very few classes of questions are more frequent or more perplexing in the courts than the construction of wills. If rules of construction laid down by the courts of the highest character, or the authority of adjudged cases could meet and solve these difficulties, there would remain no cause of complaint on that subject, for such is the number and variety of these opinions that every form of expression would seem to be met. Especially is this true of the question whether a vested remainder in interest is created after a particular estate, or whether the first taker has a fee-simple or full ownership of the property devised. And, in point of fact, when such a question arises the number of authorities cited by counsel, supposed to be conclusive of the case in hand, is very remarkable. Unfortunately, however, these authorities are often conflicting, or rise out of forms of expression so near alike, yet varying in such minute shades of meaning, and are decided on facts or circumstances differing in points, the pertinency of which are so difficult in their application to other cases, that the mind is bewildered and in danger of being misled. To these considerations it is to be added that of all legal instruments wills are the most inartificial, the least to be governed in their construction by the settled use of technical legal terms, the will itself being often the production of persons not only ignorant of law, but of the correct use of the language in which it is written. Under this state of the science of the law, as applicable to the construction of wills, it may well be doubted if any other source of enlightenment in the construction of a will

is of much assistance, than the application of natural reason to the language of the instrument under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties and the property devised with the testator and with the instrument itself."

In the subsequent case of *Robison vs. Female Orphan Asylum*, 123 U. S. 702, 707—another will case—Mr. Justice Matthews, speaking for the court, said:

"But little aid, however, in such cases is to be derived from a resort to formal rules or a consideration of judicial determinations in other cases apparently similar. It is a question in each case of the reasonable interpretation of the words of the particular will, with the view of ascertaining through their meaning the testator's intention."

In *Traverse vs. Reinhardt*, 205 U. S., 423, this court, in affirming the decree of the Court of Appeals of the District of Columbia in that case—in which it was sought to have the court hold that the expression in a will "wife or child or children" should be construed to mean "wife *and* child or children"—and declining to give such a construction to that phrase, after referring to the rule of construction that was invoked in support of the contention that the dominant idea in a testator's mind should govern, said (p. 431):

"This general doctrine is not controverted, but there are other cardinal rules in the interpretation of wills which must be regarded. Mr. Justice Story, speaking for this court, said that effect must be given 'to all the words of a will, if, by the rules of law, it can be done. And where words occur in a will their plain and ordinary sense is to be attached to them, unless the testator manifestly applies them in some other sense' (*Wright vs. Denn*, 10 Wheat., 204, 239). 'The first and great rule in the exposition of wills,' said Chief Justice Marshall, 'to which all other rules must bend, is that the intention of the testator ex-

pressed in his will shall prevail, provided it be consistent with the rules of law' (*Smith vs. Bell*, 6 Pet., 68, 75; *Finlay vs. King*, 3 Pet., 346, 377)."

In *Line's Estate*, 221 Pa., 374 (decided in 1908), there was a direction in a will that the residue of the estate should be divided among the heirs of the testator "under and according to the intestate laws of Pennsylvania." Under the laws of that State a half-brother of the testator took an interest in the personal estate, but the real estate went to nephews and nieces.

Because in the will the testator referred to his half-brother as his "brother," it was sought to have the court construe the will as giving him a brother's share in the real estate. In declining to do this, the court said:

"We agree with the counsel for the appellant that the intention of the testator must be sought from the whole instrument, and having thus been ascertained, must be enforced. Canons of interpretation and precedents are simply the means by which the intention of the testator is to be ascertained when his words are uncertain and equivocal. They cannot, however, be permitted to defeat the intention of a testator which is expressed in clear and unequivocal language. In construing such a will, no aids to interpretation are needed and none should be employed. The will speaks for itself."

The Supreme Court of Pennsylvania for a time adopted the rule that a devise to A for life *with remainder to his children who should survive him* gave the children an interest in the estate whether they survived the parent or not. Afterwards it felt compelled to abandon that doctrine. While the old decisions were in force a will was made by a testatrix who made a devise to a daughter for life with remainder to her children "her surviving." The court (in 1908) decided that the testatrix's intention should be held to be in accordance with the law as it then stood. But it said further:

"It is quite true, as urged by the appellant, that when a judicial decision is rendered the law is not presumed to be changed by it, but to have been the same before as after, although the previous decisions made have been to a different effect. This is the general rule, but it is not to be applied in all cases without discrimination. On the subject of interpretation of wills it meets the cardinal and controlling principle that the intention of the testator must prevail. It is undeniable that this principle had in certain classes of cases been so overlaid and hedged in by arbitrary canons of construction as to become a subordinate instead of a dominant rule. As was said in *Mulliken vs. Earnshaw*, 209 Pa., 226, 'The want of harmony in the cases dealing with the period to which the words "then living" or similar phrases, in a will should be applied, arises mainly from the artificial canons of construction that the period intended is presumed to be the death of the testator. The canon itself grew out of the preference in the policy of the law in all doubtful cases, for vested rather than contingent interests. *Like all artificial rules it had been the constant tendency to become an arbitrary fetter, instead of a mere instrument for the ascertainment of the testator's intent.* The policy of the later cases in this State, if not everywhere, is to get back to the true rule of looking only to the actual intent. There is no sound reason in the nature of things why the actual meaning of the person using the words should not be sought in the case of a will exactly as it is in the case of a contract."

Hood vs. Penna. Society to Protect Children from Cruelty, 221 Pa., 474, 479.

We pass therefore to a consideration of the language of this will, claiming here as we claimed below, that it is so plain that no resort is necessary to rules of construction adopted in construing ambiguous devises.

The contention of the appellants on all the principal points involved in this discussion is so clearly and forcibly

stated in a case very closely resembling it in the Court of Appeals of Kentucky that the language of that court in its opinion, which was delivered by Chief Judge Marshall, is adopted here. The case referred to is *Burnside's Administrator vs Wall*, 9 B. Monroe, 318.

The will in that case contained the following clause:

"After the death or termination of the estate hereby devised to my wife, it is my will that all my land be sold by my executors upon such terms as they may deem expedient, and the proceeds thereof be equally divided between all my children or their descendants, giving to the descendants of such as may die the same share that the parents would be entitled to if living."

The following are extracts from the opinion (p. 322):

"In whatever character the land itself, in view of the will, is to be regarded during the continuance of the estate of the testator's widow, we are of opinion that the disposition made of the proceeds is to be regarded as a bequest of money, to be raised by the sale of land, and that so far as the will leaves its transmission prior to the time when the land may be turned into money uncontrolled, its transmission is to be governed by the rules applicable to such bequests, and not by the rules relating to devises of real property.

"The paramount rule, however, in relation to both subjects, is, that the intention of the testator is to be ascertained from the will, and if sufficiently expressed, and not in violation of law, is to be effectuated according to the will. All rules for the ascertainment and effectuation of the testator's intention, are but means for the attainment of this object, and are subordinate to the great rule, that the manifest intention, if agreeable to law, must prevail.

"Having ascertained that the disposition made of the proceeds is not a devise of any interest in the land, but a bequest of money to be raised by its sale, it is scarcely necessary to say that the devise of the land to one for life, and then of the proceeds of its

sale to others, does not create either a particular estate with a remainder in the land, or a particular interest with a remainder upon it in the money, because the subjects of the two devises being distinct, they cannot coalesce and form one estate which may be considered as parceled out among different persons with respect to the period of enjoyment: (*Williams on Executors*, 778; *Fearne on Remainders*, 554; 3 *Atk.*, 219; 3 *Russ. ch. ca.*, 124.) And therefore the rules applicable to the vesting of remainders, either in personal or real estate, at the same time with the particular estate with which they are connected, do not apply. And as this is not merely a bequest to the testator's children, or to all his children as a class, to be paid at a future time, or on a future event, the rule applicable to such a case, that the interest is to be considered as vested in the children living at his death, (and in a posthumous child should there be one,) so far as to be transmissible according to law on the subsequent death of any of them, is not applicable. The express provision being sufficiently comprehensive in its own terms to embrace and provide for all possible descendants of the testator at the time when the legacy is to be raised and paid, there is neither necessity nor room for any construction founded on the presumed intention of providing for all.

"The question rather is, whether under a provision embracing expressly all descendants who could be his heirs at the period referred to, and for whom he ought to provide, other persons not heirs or descendants, can come into the distribution, claiming by operation of law in right of a deceased child or descendant, and thus diminish the fund directed expressly to be divided among all the testator's children or their descendants. And although it be conceded that the enjoyment of the legacy, that is, the distribution of the proceeds of the land is postponed, not on account of any motive affecting the persons who might come under the description of 'children or their descendants,' at the death of the testator, but from a regard to the life estate, and because during its continuance the land could not be sold, still if it

appear clearly that the testator did not intend that the persons then coming within that description were to have it at all events, but that upon the death of any of them, or of others coming after them, who might answer the description, the testator still intends to control the devolution of the right until the time when the sale and distribution are to be made, the distinction between the vesting of mere money legacies and of legacies chargeable upon land founded upon the presumed difference of motive above referred to, can have no place in the present inquiry. But the question would seem rather to refer itself to the rule, that if a legacy be not given by words of present bequest, but only in the direction to pay at the legatee's arrival at age, or after a certain period or event, the legacy does not vest, and is not transmissible until the time arrives, or the event happens on which it is payable. * * *

"Conceding, however, that the principle of these cases, that none are entitled to take but such as come within the description when the legacy is to be paid, might in some instances disappoint the intention of the testator in favor of children who might die before the event, and that the cases might not be conclusively applicable to a bequest or devise merely to the testator's children, there can be no such objection to their application to the present bequest, which by its comprehensive terms, provides for every death which might happen before the termination of the life estate, and provides for all who could then be presumed to have any claim upon the testator's bounty."

In the present case, there was not only a preceding life estate in the widow, but an estate till marriage only in the four daughter's who did not remain single. After their marriage no one had a right of possession in Metropolis View except Eliza T. Berry so long as she lived.

The difficulty in sustaining the proposition that the persons who were entitled to share in the distribution of the proceeds of the sale of the homestead of the testator in this

case were his daughters and their children and descendants, as those classes existed when he died, is illustrated by a consideration of the manner in which that proposition is stated by the court below and by counsel for the appellee here.

The conclusion of the Court of Appeals on this subject is thus stated by Chief Justice Shepard (82):

"Applying these rules, we are of the opinion that by the provisions of the fifth item of the will the daughters of the testator, who were all living at his death, took a vested interest in the Metropolis View farm, to come into possession and enjoyment upon the termination of the life estate of the wife and the death of the last surviving daughter unmarried."

In the brief of the learned counsel for the appellee in this case the same proposition is thus stated:

"The daughters of Washington Berry took under his will a life estate in Metropolis View, to take effect in possession upon the death or determination of the life estate of their mother, Eliza T. Berry, therein, to terminate on their marriage; and also at *death of testator a vested remainder* in severalty in fee, to take effect in possession on the marriage of all of them, or the death of the last unmarried daughter."

Now, it would seem to be indisputable that when Washington Berry wrote Item 5th of his will he had in his mind that a time would come when the last of his daughters would be married, or when the last unmarried one would be dead. He meant to provide for a distribution of the proceeds of a sale of the homestead upon the happening of either of those events. We are dealing with the last of these two possible events—the death of the last surviving *unmarried* daughter. As it happened, the married sisters of this daughter all died before she did, and the question is what did the testator intend should happen in that event, which was so clearly within his contemplation. Taking the above paragraph

from the opinion of the Court of Appeals in this case and eliminating all that relates to any event except that which actually happened, it reads as follows:

“Applying these rules, we are of the opinion that by the provisions of the 5th Item of the will the daughters of the testator, who were all living at his death took a vested interest in the Metropolis View farm to come into possession and enjoyment upon the termination of the life estate of the wife and the death of all said daughters.”

That is to say, the daughters were to come into possession as soon as they were all dead!

Or, taking the claim made here on behalf of the appellee, as quoted above, and changing it so as to make it relate only to the event which actually happened, it will read as follows:

“The daughters of Washington Berry took under his will a life estate in Metropolis View, to take effect in possession upon the death or termination of the life estate of their mother Eliza T. Berry therein, and also at the death of testator a vested remainder in severalty in fee, to take effect in possession on the death of the last of said daughters—”

precisely the same conclusion which was reached by the Court of Appeals, and which, with all due respect to court and counsel, is irrational. A devise of a remainder to several persons which is not to take effect in possession until they are all dead is unique, to say the least.

In the opinion of the Court of Appeals (82) the statement is made that in that court counsel for the appellants “argued that the words ‘living at my death’ must be eliminated and given no weight.”

So, in the brief here on behalf of the appellee (p 40), adverse counsel, anticipating, apparently, what would be said in this brief, says:

"As a preliminary to his citation and discussion of cases, he boldly strikes out the words '*living at my death*' from the text of the item of the will under discussion."

What was said on this subject in the brief for the appellants in the Court of Appeals, and what is repeated here, is this:

"In this controversy it would seem that the words '*living at my death*' must be eliminated whether one or the other of these two constructions is adopted. If, as is contended on the one hand, daughters only took, any daughter who would pre-decease the testator would have received nothing. If, as contended on the other hand, children and other descendants acquired an interest, it would be only the children and descendants of the daughters who survived the testator.

"Why he should have made no provision [in this clause of his will] for daughters who might die before him leaving children surviving them is not a question which requires any answer in this case. His intention to give any interest in his homestead only to the daughters who should survive him and their issue is too plainly expressed to allow controversy about it. They all survived him, so that that question never arose."

It will be seen that all that was suggested in this language is that the words referred to have no place in this discussion, not because they should be erased from the will, but because the only event in which they could have had any effect never occurred. If one of the daughters had died before her father, leaving a child who survived him, and that child were here claiming a share in the estate, then the words "*living at my death*" would be important: indeed, they would be decisive.

As will be seen further on, the testator did provide otherwise for the case of the death before him of any of his chil-

dren leaving children who should be living when he, the testator, should die.

It is to be observed that notwithstanding the will as a whole shows that the testator knew perfectly well how to make a direct devise of real estate, he does not devise the homestead outright at all, except to his wife "for and during her natural life" and to his daughters while they remain unmarried. He gives his wife this real estate for life, and gives her also for life only certain securities, rents, and money, requiring her out of all this property to support, maintain, and educate his daughters so long as they remain unmarried. When one of the daughters married and had issue she is to receive a sixth part of the personal estate given to the wife. While he gives to the daughters the right, after the death of his wife, to live on the homestead property while they remain single, as soon as one of them marries she is required to go away from the property, and no further interest of any kind in the real estate is attempted to be given to any daughter after her marriage. When they are all married or, if any of them never married, when the single daughters are all dead, *then* the executors are directed to sell the property and to divide *the proceeds of such sale* among the testator's daughters who are living at his death *and* their children and descendants *per stirpes*.

A good deal of confusion which seems to have arisen in considering the proper construction of the 5th Item of this will grows out of the failure to consider separately the several contingencies which the testator undoubtedly intended to provide for in a single paragraph. Much of this confusion disappears upon taking up each contingency separately.

Suppose that the daughter who was married when the testator died had had children born to her after the testator's death who survived her, and that after her death and during the lifetime of such children the other four daughters had married. Would anybody for a moment claim that if this

had happened, and upon the marriage of the last of the daughters the property had been sold and the proceeds were in court for division, that the children of the deceased daughter would be excluded in favor of the administrator of their mother?

Or, suppose that the daughter who was married when the testator died had thereafter had children who survived her and survived all of the other daughters, who died unmarried, and that after the death of the last unmarried daughter the property had been sold and the proceeds brought into court for distribution. Can it be seriously suggested that in such an event the grandchildren who had thus survived both their mother and all their mother's sisters would not be entitled to the proceeds of the sale as direct legatees under the will of the grandfather?

But, after all, no possible contingency can be suggested which is more to the point than that which actually occurred. Here were, not one, but four broods of children included within the description of possible legatees under Item 5th of this will who were in existence when the last of the five daughters died and the mothers of these broods were all dead. At that time the naked legal title was in the heirs of the testator—nothing had been given finally to the daughters except what was given to them *and* their children and descendants, and that was not an interest in the real estate, but a right to share in the distribution of the proceeds of a sale of the real estate which was then to be made. To say that in such a contingency the grandchildren are to be ignored and the proceeds of the sale distributed among the administrators of the four daughters who were married is to shut one's eyes to the will and to go into the field of conjecture in the hope of finding some rule of construction which will lead to a different result.

Earnestly insisting that there is no such ambiguity in Item 5th of the will of Washington Berry as justifies a reference to the other contents of the will or to rules of con-

struction to determine what the testator meant by this item, it is claimed on behalf of the appellants that the other parts of the will and the rules of construction relating to vested and contingent remainders lead to the same conclusion as that which follows from the language of the will itself.

By Items 1st and 2d the testator devised to each of two sons and his 'heirs and assigns' certain real estate, requiring the sons, however, as a condition precedent to their right of possession under such devises, to "deliver a deed of bargain and sale, release and confirmation" to his daughters jointly "and their heirs and assigns" of certain other real estate. This language demonstrates that the testator well knew the proper and technical language to be used in devising an estate in fee simple, and it shows, therefore, that when he intended that real estate should go to his daughters in fee simple he knew how to express that intention.

In each of Items 1st and 2d there is a further provision that if the sons shall not comply with the foregoing condition precedent then the land which is devised to them conditionally shall be divided among his daughters "living" or "living at my death." The difference between this language and that which is in question here leads naturally to the conclusion that the testator intended in the one case that his daughters alone should be benefited, while in the other he makes the daughters and their children and descendants the recipients of his bounty. The reason for this difference is obvious: the testator in Items 1 and 2 was referring to what should be done at once on his death, while in Item 5 he was looking into the distant future—to a time when he should have grandchildren or still remoter descendants. And by no stretch of the imagination can it be supposed that if a son had forfeited this gift, by refusing to comply with the condition, the children of a daughter who was not living at the time of the testator's death would have been entitled to any interest in the forfeited estate.

In Item 3d the testator gives to another son a fee simple

in certain real estate by devising it to him, "his heirs and assigns."

In the next item (which is not numbered) the testator shows his intention to provide for the descendants of his children by declaring that if any of the three sons shall die without leaving lawful issue the estate of such son shall go to the survivor or survivors and his or their heirs. It is of no consequence here whether this provision was or was not void as an attempt to limit the several estates in fee simple given to the sons. For the present purpose it is sufficient to show that as to his male children the testator intended that unless they provided him with grandchildren to take after them they should take only life estates.

In the sixth item of the will the testator makes a residuary devise to his children to take effect immediately upon his death, adding—"*the descendants of such as may have died during my life to take a parent's share.*" The language here quoted is of great importance in view of the remarkable suggestion contained in the opposing brief in this case, that the court should rewrite the part of the fifth item of the will in question so that it will read—

"and the proceeds thereof be distributed by my said executors among my daughters and their children and descendants living at my death."

This Item 6th shows that the testator had not overlooked the possibility of one of his daughters dying before her father leaving children surviving her; and it shows that he knew how to provide for such grandchildren or other descendants of such daughter. We are not advised how much property Washington Berry left which would pass under this residuary clause, nor would it seem to be important whether it was much or little. It was for him to say how his estate should be divided among his descendants, and when he provided as he did in this clause that if he should leave any grandchildren by a daughter who should not survive him such grandchildren should take the parent's share of the resi-

due of his estate, there is no room for the suggestion that he intended to make some other provision for such grandchildren and excluded them by mistake.

The suggestion above referred to of the learned adverse counsel as to re-writing the clause in question by transposing the words "living at my death" to the end of the sentence deserves a moment's consideration. Taking the whole of that part of the sentence in which these words are found and omitting the widow's life estate and all that relates to the event which did not occur—the marriage of all the daughters—we have this result:

"After the death of all my daughters I direct that the said estate shall be sold and the proceeds thereof be distributed among my daughters and their children and descendants (*per stirpes*) living at my death.

Thus the change which the court is asked to make in the language of this will would still make the testator say that the proceeds of the sale should go to his daughters living at his death after they were all dead.

Item 7th of the will is not without its weight in this connection. That contains the not unusual provision that if any of the beneficiaries under the instrument shall undertake to set it aside "he, she or they" shall be entitled to only one hundred dollars out of his estate. In this clause he speaks of his will as his "solemn and deliberate disposition of his property"—thus showing that there was no such haste or undue consideration in the preparation of the instrument as would lead to such a blunder in the fifth item of the will, as counsel suggests as a ground for asking the court to rewrite that item. It should be noted, too, that in this Item 7th the testator shows a clear understanding of the law. He does not content himself with revoking every devise and bequest to the beneficiary who shall contest the will. If he stopped there it might be contended (as it often has been contended in similar cases) that since as to such lapsed devise or bequest

he would die intestate the contesting beneficiary, as one of his heirs, would get a share of it after all. He carefully provides that if such contest shall be undertaken the property devised or bequeathed to the contesting beneficiary shall fall into the general residue of his estate and be divided and distributed among his heirs and distributees, excluding therefrom "him, her or them who shall have instituted such action."

It would seem that there is nothing in the other parts of the will which tends to sustain the contention of the appellee as to the proper construction of Item 5th.

The next question is whether there is anything in the rules of law as to the construction of wills which requires the court to overthrow the manifest intention of the testator in this case as to the persons who should share in the distribution which he directed to be made when he should have no living unmarried daughter. Such of these rules as seem to relate to the subject-matter of this controversy will now be considered.

1. *When in a will there is no direct gift of property to the beneficiaries, but merely a direction that after the termination of a preceding life, or other particular estate, it shall be divided among or paid to certain classes of beneficiaries, in the absence of anything in the instrument to indicate a different intention, only those of the classes described who survive till the time fixed for the distribution will participate therein.*

When a testator, after giving his widow a life estate, directs his property to be sold after her death and the proceeds divided among his "surviving children," any one unacquainted with the artificial rules regarding the construction of wills which have been introduced from time to time would

take it for granted that he referred to children surviving his widow. As this would ordinarily be the result of the testator's oversight in not providing for the case of a child dying after him but before the widow, leaving issue, some courts have strained a point to bring about a result which the testator would have himself provided for if he had thought of it. Hence the rule as to early vesting in such cases referred to by Mr. Chief Justice Alvery in *O'Brien vs. Dougherty*, 1 App. D. C., 148, which is quoted from on page 48 of this brief.

But it is obvious that there is no occasion for the application of that rule when the testator has carefully provided not only for his children, but for all their issue. If in the simple case above supposed the devise is to the widow for life, with remainder over to the children of the testator, and *their* children, to construe the will as referring to things as they exist when the testator dies is to use a rule which was adopted to protect grandchildren for the purpose of taking away from grandchildren that which is plainly given to them.

And when the final sale and distribution is not to take place till the children of the testator are all married or all dead, it seems impossible to maintain that the grandchildren who are mentioned as distributees are those only who may be living when the testator dies. And so are all the authorities.

Where there is no gift, but a direction to pay or divide and pay at a future time, or on a given event * * * the vesting will be postponed till after that time has arrived, * * * unless from particular circumstances a contrary intention is to be collected.

An exception to this rule arises where during the intermediate period the legatee is to receive the interest on the legacy.

2 Williams on Executors (Sixth Am. Ed.), bottom pages 1232-1233.

When the only gift is in a direction to pay at a future time, and the will does not otherwise indicate any intention to make a present gift, the remainder will generally be construed contingent.

1 Jarman on Wills (Sixth American Edition), star page 757, Note 2.

Devise to wife for life, then to trustees to sell and to distribute the proceeds "amongst mine and my wife's nephews and nieces hereinafter mentioned and the survivors or survivor of them, viz: (naming them) and I do hereby give and bequeath the same to them and to the survivors and survivor of them, after the decease of my wife."

The Master of the Rolls (Sir Thomas Plumer) held that only those remaindermen who survived the wife took under this provision, saying:

"The subject-matter is not to be converted into money till after the death of the tenant for life; it is then that for the first time anything is given to the trustees. It is given, upon trust to be converted into money, and then to be divided. Thus not only was there no bequest before the widow's death, but the subject-matter did not till then exist in the shape and form in which it is given."

Hoghton vs. Whitgreave, 1 Jac. & Walk., 146.

Devise to nephew for life then to son or sons in tail male, and in default of such sons to trustee to sell and distribute the proceeds equally among the sons and daughters of testator's late niece, Anna Winder, "or the survivor or survivors of them."

It was held that the time of survivorship referred to the time of sale and distribution.

"In this will * * * there is no gift till the distribution; the object of the distribution is pointed out to be among the persons named, or the survivors or survivor."

Brograve vs. Winder, 2 Vesey, Jr., 638 (Lord Chancellor Loughborough, 1795).

Devise in trust for benefit of testator's brother and his daughter's children, and after the decease of the daughter and her children if they should die under twenty-one, the residue to be distributed among testator's relations.

It was held that this meant the testator's next of kin, as they stood, not at his death, but at the time of distribuion.

Jones vs. Colback, 8 Vesey, Jr., 38.

Devise to granddaughter Elizabeth for life, "and at her death to be equally divided among the children of said Elizabeth then living or the descendants of such children," held:

1. That the remainder vested in the descendant class as a class and not individually in the persons comprising such class, and that the entire subject of the gift survived to and vested in the persons constituting such class at the period when payment or distribution was to be made.

Nichols vs. Guthrie, 109 Tenn., 536.

A testator devised his farm to his executors to be managed by them until his debts were paid. The farm was then to go to his wife for life. Then came this provision:

"I devise my executors or the survivors of them after the death of my said wife shall sell said last mentioned farm, either at private or public sale, and that the proceeds shall be divided equally between my brothers and sisters and their heirs—the children of any that may be dead to have the shares of their deceased parents."

It was held that upon the death of a brother or sister before the death of the widow his or her lineal descendants would take *per stirpes* his or her share. The court said:

"If these legacies vested in interest absolutely at the testator's death, then upon the subsequent death of a legatee, during the life of the widow, his legacy would pass to his administrator or other personal representative. But this the testator did not intend.

For he has directed that the share of any one who would if living be entitled to a part of the fund shall in the event of the previous death of such contingent legatee, be paid to his or her children. The gift itself and not merely the time of payment remained contingent therefore during the life of the widow. *old as to be ascertained after her death.* The persons entitled to the enjoyment of the fund *Richey vs. Johnson, 30 Ohio St., 288, 296*

A will provided that—

“When my youngest child arrives at full age, I desire that the real estate be equally divided among my children, their heirs or survivors of them.”

Held that the children took no vested interest till the youngest child attained majority.

In support of this conclusion the court cites: 2 William on Executors, 514; Hawkins on Wills, 232; Jarman on Wills (as quoted in 118 Ill., 403), and Beach on Wills, sec. 120, and says it has found no case contravening the rules laid down by these authorities.

McClain vs. Capper, 98 Iowa, 145.

Devise to wife for life, and after her death “to be divided equally among my children who may survive.”

The question was, Were the remainders to children contingent or vested? And that was said to depend on whether “who may survive” referred to surviving the testator or surviving the wife.

It was held that the remainders were contingent. The court recognizes the general rule as to the presumption being that bequests or devises take effect on the death of the testator and are vested. But it is said that this applies only where there is ambiguity and that in this case there is none; that when there is not a direct gift of the remainder, but a direction that at the termination of the precedent estate, the property shall be divided between certain classes

specified; that circumstance effectually displaces the presumption.

Re Moran's Will, 118 Wis., 177.

Devise of estate of testatrix to her two sons for life and after their death the principal to "go to their living children at the age of twenty-one."

Held that this meant children living at time of distribution.

While the will did not expressly direct a sale of the real estate, the court held that by necessary implication it did, so that the sons were to have the income and on their death the then living children took the principal. This, it was said, gave the whole estate the character of personal property.

The court says that the will contains an "express declaration" that the corpus of the property shall go to the children living at the time of the termination of the life estates. The exact language is quoted above.

Benner vs. Mawer, 113 N. W. Rep., 663 (Wisconsin, 1907).

"The same distinction which is taken between a gift on a particular day and a gift to be paid on such day is also taken between a case like the present where there is a simple direction to divide at a specified time and where there is an express gift accompanied with a direction to divide at such specified time. In the first case the gift does not vest until the time of division; in the second it vests at the testator's death, and the division only is postponed."

The court refers at the end of this quotation to "2 Jarman on Wills, 455 *et seq.*," and quotes from page 457 (Sixth American Edition, Star page 797):

"Where the only gift is in the direction to pay or distribute at a future age, the case is not to be ranked with those in which the payment or distribution only is deferred, but is one in which time is of the essence of the gift."

McCartney vs. Osburn, 118 Ill., 403-423.

A testator devised land to his wife for life, remainder "to my three children equally to be divided between them to have and to hold to them for their lives, and after the death of either of them their share to be equally divided amongst their children or their descendants giving to the descendants of each child one share—to the girls for life remainder to their children and descendants."

Held that the daughters took for life only, the remainder being contingent because until the death of a daughter it could not be determined what, if any, children would have been born her or whether such child died before her leaving descendants, and that only children or descendants living at her death would take.

"The conclusion can be scarcely resisted that the thought of the testator was to place his daughter's share of his estate beyond the interference or control of her husband in the event of her marriage and make provision alone for her and her lineal heirs."

The daughter whose share was in question did not marry until after testator's death.

Bates vs. Gillett, 132 Ill., 287, 299.

Devise in trust for use of testator's wife and daughter, with provision that in case of the death of the daughter without issue, her mother surviving, one-half of the estate on the death of the widow "to be divided equally amongst the grandchildren of my deceased father."

It was held that only the grandchildren of testator's father who were living when the widow died took under this clause.

"The testator must have had in mind those who answered to that description at the time of the distribution. He was speaking of the grandchildren of his deceased father not at the time of his own death, but at the time of the death of his daughter, but at the time of his wife's death. At her death he says the division is to be made. There are

in the will no words importing a gift to his father's grandchildren except in the direction to make the division among them at the time of distribution. His language must refer to that time—the time when the division is to be made."

The court gives other well-considered reasons for its conclusion, and cites *Matter of Baer*, 147 N. Y., 348, and numerous other cases as supporting its conclusion.

Stoors vs. Burgess, 101 Me., 26, 34.

Devise in trust for benefit of testator's daughter for life, then for benefit of his sister for life, and upon his sister's death to convey the remainder "to the children and lawful heirs of my brother Harmon Hendricks, deceased, to share and share alike *per stirpes*."

It was held that only the heirs of Harmon who were living at the time of the sister's death took under this provision.

Harmon Hendricks had ten children living when the testator died, all of whom died before the period of distribution. Some of them left wills. The court says that if the interests vested at the death of the testatrix, there would be brought into the class of devisees "persons who are not of her (testatrix's) blood and who were wholly unknown to her in her lifetime."

Several earlier cases in New York are cited to the point that where final division and distribution is to be made among a class, the benefits of the will must be confined to those who come within the appropriate category when the distribution is to be made.

Matter of Baer, 147 N. Y., 348.

For one of the New York cases referring to others and holding on great consideration that where there is not a direct gift, but a direction to pay over at a future time only those take who are living at the time of distribution, see:

Dougherty vs. Thompson, 167 New York, 472.

In a case growing out of a will by which an estate was devised in trust with directions to pay certain proportions of gifts to children upon their arriving at a certain age it was held that their shares did not vest because the gift was through direction to convey and there was no vesting till the time to convey arrived (citing *Matter of Baer*, 147 N. Y., 348, 354, and *Matter of Crane*, 164 N. Y., 71, 76).

Stress is laid on the fact that the testator evidently wanted to prevent his children from squandering their shares, which intention would be defeated if their interests vested, because then they could sell their shares.

Lewisohn vs. Henry, 179 N. Y., 352.

Devise to trustee to pay income to testator's sister during her life, and on her death to pay over and distribute the estate to her children.

It was held that the widow and living children could not give a good title, because the children's interest was not vested, and they might all die before their mother, in which case the title would pass by inheritance from the testatrix.

(Citing numerous cases in New York Court of Appeals.)

In re Hogarty, 70 N. Y. Supreme Court, 428. Affirmed by App. Div., 62 App. Div., 79.

Devise to trustees to pay several annuities, the principal fund, on the death of the last annuitant, to be divided "among my grandchildren *per stirpes*." It was held that only grandchildren living at the time of division were entitled to share.

Hale vs. Hobson, 167 Mass., 397.

The testator whose will was the subject of controversy in the last-mentioned case had valuable real estate in New York. The same question that was decided by the Supreme Court of Massachusetts came before the Court of Appeals of New York. Under the law of that State the limitation was void if the grandchildren did not take a vested estate, inasmuch

as in that case there would be no person or persons living who could dispose of the entire interest in the land till after the death of all the eleven annuitants, while in New York estates can be so tied up only during the life of two persons and twenty-one years thereafter.

In an elaborate opinion by Miller, J., speaking for the whole court except Earl, not voting, it was held that the interest of the grandchildren was contingent, and that the will as to real estate in New York was void.

Hobson vs. Hale, 95 N. Y., 588.

Devise in trust for the benefit of certain children of testatrix, and if any of them should die without issue, the share of such deceased child to "be held by my trustee aforesaid for the use of my surviving sons or daughters, to be equally divided between them."

It was held that by surviving sons or daughters the testatrix meant those who survived the deceased child whose share was to go over.

Dary vs. Grau, 190 Mass., 482.

Devise in trust for benefit of wife and daughter of testator, and if upon the death of the survivor of them there should be no living descendants of the testator, the trust fund to be distributed among the testator's right heirs.

It was held that the distribution of the remainder should be among those who were his heirs when the period of distribution arrived.

There are several things in this particular will which led the court to so construe it. But among other reasons, the court (citing *Hale vs. Hobson*, 167 Mass., 397, and other cases in Massachusetts) refers to the fact that the will contained no words of present gift.

Boston Safe Deposit Co. vs. Blanchard, 196 Mass., 35.

Devise substantially to three children as joint tenants for life

"then after all my aforesaid children die, then in that ~~case all my aforesaid estate to go and be divided be-~~
~~case all my aforesaid estate~~ * * * to go and be
 "divided between the children the lawful heirs of my
 "aforesaid children, the lawful heirs of my aforesaid
 "children to receive and be allowed and paid what
 "would have been their parents' share of my afore-
 "said estate."

Held that the gift to the grandchildren was contingent, and could not vest unless there were living, at the time of the death of the last surviving child of the testator, children of his three children to whom the life estate was given.

The court approves the rule that when the only direction in the will is to pay, the bequest or devise is not to be ranked with those in which payment or distribution only is deferred, but is one of which time is of the essence of the gift. Quoting and following *Matter of Crane*, 164 N. Y., 71. Citing as the law also *Hale vs. Hobson*, 167 Mass., 397, and *Clark vs. Caniman*, 160 N. Y., 315.

Reilly vs. Bristow, 105 Md., 326.

In *Rosengarten vs. Ashton*, 228 Pa. 389 (decided in 1910) there was a devise in trust to pay the income to children followed by this provision:

"On the death of the last of my children then to pay over and distribute said trust estate equally to and among all my grandchildren and the issue of such as may be dead, such issue to take the share the parent would have taken if living at the time of the death of my last surviving children."

The question in this case was what interest, if any, was taken under this provision by a granddaughter who died without issue before the time for distribution. In holding that the interest of such grandchild was contingent on her

surviving all the children of the testator, the court said (p. 393):

"The testator made no direct or express gift to his grandchildren. He directed that upon the death of the last of his children the trustees who shall have held a moiety of his residuary estate up to that time, for the purposes stated in the second section of the thirteenth clause of his will, shall make distribution of it 'equally to and among all my grandchildren and the issue of such as may be dead, such issue to take the share the parent would have taken if living at the time of the death of my last surviving child.' Whatever interest a grandchild takes in the corpus of the grandfather's estate passes under this clause, which simply directs distribution. No gift of an interest in the estate to a grandchild is to be found in any other clause of the will, and the gift is implied only from the direction to divide. This must be conceded, and the well-known rule in such a case is that, as the direction to pay or divide constitutes the bequest, the vesting of the interest itself is postponed, and not merely the possession or enjoyment of it. 'Where there is no gift but in a direction to pay or transfer or divide among several persons, at a future period, though the future period is annexed to the payment, possession or enjoyment, yet it is also annexed to the devise or bequest itself. For, in this case, the direction to pay or transfer or divide, constitutes the devise or bequest itself; and, therefore, the vesting in interest is postponed, and not merely the vesting in possession or enjoyment.' Smith on Executory Interests, sec. 314. 'The ruling principle of a case like this is, that where there is no separate and antecedent gift which is independent of the direction and time for payment, the legacy is contingent; and it seems to be as well founded in reason, as rules of interpretation usually are. Where a gift is only implied from a direction to pay, it is necessarily inseparable from the direction, and must partake of its quality, insomuch that if the one is future and contingent, so must the other be.' Gibson, C. J., in *Moore vs. Smith*, 9 Watts, 403. 'The rule is conceded that

where there is a bequest in the form of a direction to pay, or pay and divide, "from and after" the happening of any event," then the gift being to persons answering a particular description, if a party cannot bring himself within it he is not entitled to take the benefit of the gift:" *Man's Est.*, 160 Pa. 609. Many more of our own cases might be cited which announce the same rule. Reference is made to a number of them in *Reiff's Appeal*, 124 Pa. 145."

2. That a remainder is vested on the death of the testator does not necessarily determine that the devisee, his heirs or assigns shall be entitled to the property which is the subject of the gift, since the estate so vested may be divested by the death of the devisee before the determination of the preceding particular estate.

The Court of Appeals reached the conclusion (82) that on the death of Washington Berry his daughters took a vested interest in the Metropolis View farm, and the court assumed that if the daughters did take a vested interest at that time their title would be complete upon the death of the widow. It will be seen by the extract from the brief on behalf of the appellants in the Court of Appeals, which extract was filed as a part of a motion that was made for a rehearing in that court (85-90), that in that court it had been urged on behalf of the appellants that even if the daughters did take a vested interest upon the death of their father it was subject to be divested in favor of their children as to any of them who should not live until the happening of one of the events by which the testator fixed the time for the sale of the homestead and the distribution of the proceeds.

Inasmuch as the briefs in the Court of Appeals are not made a part of the record brought to this court, one object of this motion for a rehearing was to get into the record the argument in the Court of Appeals on this subject so that it might not appear that this contention was first made here. Another object, as stated in the motion, was to have that

court determine whether under the proper construction of the will, even if the interest which the daughters took at the death of their father was then vested, it was nevertheless subject to be defeated. The only effect, however, of the motion was that the court added to the opinion which had been previously filed this sentence (84) :

"We think the third point of the appellants is embraced in the conclusions announced."

So, in the brief on behalf of the appellees in this court, counsel deals with this subject substantially in the same way that the Court of Appeals disposed of it. It is argued at great length that when Washington Berry died his daughters took a vested interest in his estate. Hardly any reference is to be found in the brief to the question whether, assuming that to be so, such vested interest of the daughters was subject to be defeated by their death before the time fixed in the will for the sale of the homestead farm.

Thus both the court below and opposing counsel here avoid the real question in the case by reference to a rule which if applied decides nothing that is involved in this discussion. The only difference (at common law) between a remainder that vests at once subject to defeasance by the death of the devisee before the right of possession accrues, and one that does not vest at all unless the devisee survives till that time, seems to be that in the first case the interest is alienable by grant or devise or otherwise, and may be attached by creditors, while in the second case the interest is regarded as too uncertain to be transferable in any way. 2 Wash. on Real Property, star pages 263 and 530; 24 Am. & Eng. Enc., 405; 23 L. R. A., 642, note; 27 L. R. A., N. S., 454, note.

Assuming therefore that the intention of this testator was that the distribution involved was to be made among his daughters and their children and their remote descendants as those classes should exist, not when he died but when the

distribution was to take place, it becomes wholly immaterial whether the chance which each daughter had of being in existence when that time came gave her a purely contingent interest, or a vested interest subject to be defeated by her prior death leaving children or other descendants to take her distributive share in her place.

Adopting on this subject and inserting here the part of the brief for the appellants in the court below, which is on pages 85 to 90 of the record, and apologizing to the court for spending so much time on so plain a proposition, reference will now be made to some of the cases relied on by the Court of Appeals or by counsel for the appellees for the purpose of showing that the determination in them that the interests involved were vested on the death of the testator does not in the least affect the question whether this will is to be construed as giving to the testator's daughters upon their mother's death the entire interest in the homestead to the exclusion of their children and other descendants, whether they (the daughters) lived to the time fixed for distribution or not.

In *Myers vs. Adler*, 6 Mackey, 515, the devise was to testator's widow "during the term of her natural life so long as she shall remain my widow and unmarried" and "from and after her death" to trustees to sell and pay certain legacies. Mr. Justice Cox, in delivering the opinion of the Supreme Court of the District of Columbia in General Term, said (p. 520):

"We are unanimously of the opinion that this gave to her an estate for the term of her life, and that the words 'so long as she shall remain my widow and unmarried' are merely a qualification or condition attaching to that estate, *a condition subsequent upon the breach of which the estate is liable to be defeated*; that is, if the widow should marry, the heirs might enter and dispossess her, and that might defeat the remainder over; but until the breach of the condition it remains a complete life estate in the widow. In 2 Washburn on Real Property, page 6, it is said:

" 'An instance of a condition subsequent would be

a grant to A and his heirs, tenants of the manor of Dale, or to B, so long as she remains a widow. The estates in these cases vest subject to be divested, in the one case upon the grantees ceasing to be tenants of Dale, and the other upon the marriage of the grantee.' "

In *Richardson vs. Penicks*, 1 App. D. C., 261, a testator had devised real estate to his mother, "to have and to hold during her natural life and after her death to my son upon his attaining his majority." There was a further provision that in the event of the mother surviving the son the property was devised to the testator's sister upon his mother's death. In delivering the opinion of the court as to the construction of these provisions Mr. Justice Shepard said (p. 265) :

"To hold that George R. Lawrie took a *vested remainder* in the house and lot in controversy after the life estate of testator's mother, to come into enjoyment upon arrival at majority, and *subject to defeasance by his death before hers*, in which event it would pass to Sarah J. Penicks, is more in accordance with the general intention of the testator, as it appears to us from the whole will, than any other conclusion to which we have been urged."

In *Carver vs. Jackson*, 4 Peters, 1, so much of the opinion as relates to this point is thus stated concisely in the syllabus:

"Conveyance in a marriage settlement, to the use of R. and M., the husband and wife, and the survivor of them, during their natural lives, 'then to the use and behoof of such child or children as shall or may be procreated between them, and to his, her, or their heirs and assigns forever; but, in case the said R. and M. shall have no child, and that such child or children shall die during the lifetime of R. and M., and M. should survive R. without issue, then to the use of M. and her heirs.' Held: 1. That each child, when born, took a vested remainder in fee,

subject to open and let in after-born children. 2. That this vested estate in fee was defeasible upon the contingency that the wife should survive the husband without issue. 3. That there was no objection to the limitation of a fee upon a fee in this manner, by way of shifting use. 4. That the existence of this executory limitation over to the wife did not render the preceding estate a contingent remainder, *but a defeasible, though vested, fee*, the contingency attaching not to the prior, but to the subsequent estate."

In *Croxall vs. Shererd*, 5 Wall., 268, Mr. Justice Swayne, speaking for this court, said (p. 288):

"It is the present capacity to take effect in possession, if the precedent estate should determine, which distinguishes a vested from a contingent remainder. Where an estate is granted to one for life, and to such of his children as should be living after his death, *a present right to the future possession vests at once* in such as are living, *subject to open and let in after-born children, and to be divested as to those who shall die without issue*. A remainder, limited upon an estate tail, is held to be vested, though it be uncertain whether it will ever take effect in possession. A vested remainder is an estate recognized in law, and it is grantable by any of the conveyances operating by force of the statute of uses."

In *Doe, lessee of Poor, vs. Considine*, 6 Wall., 458, Mr. Justice Swayne, speaking for the majority of the court, quoted, with approval, the following paragraph from *Blanchard vs. Blanchard*, 10 Allen, 227:

"Where a remainder is limited to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event *that must unavoidably happen by the efflux of time, the remainder vests in interest* as soon as the remainderman is *in esse* and ascertained, provided nothing but his own death before

the determination of the particular estate, will prevent such remainder from vesting in possession; yet, if the estate is limited over to another in the event of the death of the remainderman before the determination of the particular estate, *his vested estate will be subject to be divested* by that event, and the interest of the substituted remainderman which was before either an executory devise or a contingent remainder, will, if he is *in esse* and ascertained, be immediately converted into a vested remainder."

In *McArthur vs. Scott*, 113 U. S., 340, the testator had put his estate in trust for division of the income, until his youngest grandchild should become 21 years of age, equally among the children or the issue of any child dying, and among the grandchildren also as they successively became of age, and directed that "after the decease of all my children and when and as soon as the youngest grandchild shall arrive at the age of 21 years" the land should be "inherited and equally divided between my children *per capita*, in fee; and that if any grandchild should die before the final division leaving children they should take and receive *per stirpes* the share which their parent would be entitled to receive if then living. In delivering the opinion of the court in that case Mr. Justice Gray said (p. 381):

"The direction that if any grandchild shall have died before the final division, leaving children, they shall take and receive *per stirpes* the share of the estate, both real and personal, which their parent would have been entitled to have and receive if then living, was evidently intended merely to provide for children of a deceased grandchild, and not to define the nature, as vested or contingent, of the previous general gift to the grandchildren, and *its only effect upon that gift is to divest the share of any grandchild deceased leaving issue*, and to vest that share in such issue. *Smithers vs. Willock*, 9 Ves., 233; *Goodier vs. Johnson*, 18 Ch. D., 441; *Darling vs. Blanchard*, 109 Mass., 176; 1 *Jarman on Wills* (4th ed.), 870."

In *Thaw vs. Ritchie*, 136 U. S., 519, there was a devise to the testator's widow for life with remainder over upon her death to the testator's children or the survivor of them in fee, and if both children should die before the widow, the widow was to take the fee. In delivering the opinion of this court in that case, Mr. Justice Gray said (p. 546):

"The legal estate in remainder in the children, which nothing but their own death before the termination of the widow's life estate could prevent from vesting in possession, vested in them from the death of the testator, subject to be divested by their dying before the widow. Doe vs. Considine, 6 Wall., 458, 476; McArthur vs. Scott, 113, U. S., 340, 379. Their legal estate in remainder, as well as their equitably estates for life, were present interests, which might be sold for their maintenance and education."

In the very recent case of *Hine vs. Morse*, in 218 U. S., 493, a case which came up from this District, where a testator gave real estate to his wife for life, with remainder to his son Robert Edward and any other children that might thereafter be born to him, with the proviso that if his wife should marry and no child of the testator's by her be then surviving, the property, after the wife's death, should be sold and the proceeds paid to other persons, this court said:

"Technically, the interest (of the son) was a vested remainder subject to open and let in the testator's brothers and sisters and to be divested upon the death of Robert E. Hine and remarriage of the life tenant."

It is submitted that the ground upon which the Court of Appeals rested its decision in this case—being the ground upon which counsel for the appellee mainly relies here: that the interests of the daughters of Washington Berry, in the distribution of the proceeds of the sale of the homestead vested in them on his death—is an immaterial ground,

because back of it is the question whether, if that be true, these interests were divested in favor of their children by all of them dying before all of them were married.

But it is by no means conceded that on this point the Court of Appeals was right. It has already been shown (page 24 of this brief) that where there is no direct devise of land, but a mere direction to pay upon the happening of some future event, the interest so given does not vest on the death of the testator. And aside from that it is insisted on behalf of the appellants that the cases in this court upon which adverse counsel relies do not sustain his contention.

The two cases most relied on in this connection by the Court of Appeals and by adverse counsel here are *Doe ex Rel. Poor vs. Considine*, 6 Wall., 458, and *Cropley vs. Cooper*, 19 Wall., 167.

In *Doe, Lessee of Poor, vs. Considine*, 6 Wall., 458, that part of the will with which we are concerned in this case devised certain real estate to Maria Barr during her life, and further provided that upon her death in case she should survive her husband, John M. Barr, if not then upon the decease of the said John M. Barr, the remainder was to go in fee to John M. Barr's children. There was a still further provision that if John M. Barr should die without issue the remainder was to go to the testator's sons-in-law, William Barr, James Keys, and John B. Enness, and their heirs in fee. John M. Barr having died leaving no issue but his daughter Mary Jane Barr, and she having died in infancy, unmarried, and the life of her mother, Maria Barr, having terminated by her death, the question was presented: In whom was vested the title to the premises in controversy? And that involved the question whether the interest of the child Mary Jane Barr was indefeasible and vested in her upon the death of her father, John M. Barr.

In holding that the interest of Mary Jane Barr was so

vested, Mr. Justice Swayne, speaking for the court, said (pp. 474-478) :

"The theory of the counsel for the plaintiff derives no support from the principle of human nature, which not unfrequently impels a testator to transmit his property, as far as possible, in the line of his descendants. Here Barr, Keys and Enness were not of the blood of the testator. He could not but be aware that if they took the property it might pass from them, by descent or purchase, to those who were strangers to his blood, and in nowise connected with his family. * * * According to the theory of the plaintiff's counsel, if Mary Jane Barr had married and had died before her mother, leaving children, they would have been cut off from the estate. Surely, the testator could not have intended such a result."

(It may not be out of place to note that in the above case of Doe *vs.* Considine, Mr. Justice Grier, in delivering a dissenting opinion, which was concurred in by Mr. Justice Clifford, said :

"In the construction of a will the first great rule—one that should control and govern all others—is that the court should seek the intention of the testator from the four corners of his will. All technical rules, from Shelley's case down, were established by courts only for the purpose of effectuating such intention. But it is easy to pervert the testator's intention by an astute application of cases and precedents, of which the present case is the last example of many which have preceded it, and where the testator's intention is entirely defeated by the application of rules intended to effectuate it. The remainder in fee to the children of John M. Barr was not to vest *till the decease of Maria Barr*. 'And upon the decease of said Maria, I devise the remainder of my estate to the legitimate child or children of John M. Barr and his heirs forever, remainder over to the testator's sons-in-law in case of failure of such issue of the son.' Such is the language. By construing

the remainder to vest before 'the decease of Maria Barr,' the executory devise to the sons-in-law is entirely defeated, and the clear intention of the testator frustrated by factitious rules intended to facilitate its discovery.")

In *Cropley vs. Cooper*, 19 Wall., 167—a case that originated in the District of Columbia—the will in question gave an estate to Elizabeth Cropley Cooper for life, with remainder to "her children or child when he, she or they have married at the age of 21 years, the interest in the meantime to be applied to their maintenance."

Mrs. Cooper having had two children, both of whom died without issue after the death of the testator, but during her life, it was held that notwithstanding that they did not survive her they took a vested and indefeasible interest in remainder which passed to her on their death. It was sufficient to justify this conclusion that the will directed the payment of the income to the children, during their minority, for, as Mr. Justice Swayne said (p. 174),

"Where a bequest is given by a direction to pay when the legatee attains to a certain age, and the interest of the fund is given to him in the meantime, this shows that a present gift was intended, and the legacy vests in interest at the death of the testator."

Mr. Justice Swayne goes on, however, to say that it was a consideration of weight that if Mrs. Cooper's children had married and left children, according to the proposition of the appellee in that case, they—the children—could have taken no benefit from the provision made for their father, and he adds this sentence, on which counsel for the appellee here lay great stress:

"In real property cases, where the question arises whether a remainder is vested or contingent, this consequence is held to be conclusive, that it was the former."

Counsel for the appellee use this expression of Mr. Justice Swayne's as holding that there is always a vested and indefeasible interest in a devisee in remainder who may die leaving children before the determination of the preceding estate. Of course, that was not what Mr. Justice Swayne intended. He could have meant only that where the testator has left it uncertain as to whether the devise should or should not fail by the death of the beneficiary in remainder before the termination of the preceding estate, the courts lean to the construction which will not defeat the interest, so that the devisee's children may take.

If there be a devise to A for life with remainder to B in fee, if he survive A, and if he should not survive A, then to C and his heirs, nobody would contend that upon B's death during A's life leaving children, they would take in his place to the exclusion of C and his heirs. Or if there should be a devise to A and B for their joint lives with remainder in fee to the survivor of them, no one would claim that upon the death of B leaving children during A's life, B's children would take any interest under such a devise. In both these supposititious cases if it should be held that the interest of B vested upon the death of the testator, it would be with the necessary qualification, that his interest would be divested if he should not survive A.

In both *Doe vs. Considine*, 6 Wall., 458, and *Cropley vs. Cooper*, 19 Wall., 126, the reasons given by Mr. Justice Swayne for the conclusion reached by the court lead in this case to a directly opposite conclusion from that which is maintained for the appellee here. In the *Considine* case the court held that the children of Mary Jane Barr took a vested and indefeasible estate, because to hold otherwise would exclude her children from participation in the estate and give the property to strangers to the blood of the testator, a result which the testator could not be supposed to have intended. And in *Cropley vs. Cooper* the same reason substantially was given for holding that the children of

Elizabeth Cropley Cooper took a vested and indefeasible interest in the property involved. In both cases the court held it to be *implied* that grandchildren were not to be excluded. In this case counsel use Considine's case and Cooper's case for the purpose of having *excluded* from participation in the estate grandchildren who are the *express* object of the testator's bounty. Nothing could more clearly than this illustrate the danger of falling into error which is likely to result when the intention of a testator is not ascertained from the language which he has used in his will, but from "rules of construction." It is better to stick to the text of the will than to conjure up doubts by applying formulas intended for use only when there is no other way open. This was well expressed by the Supreme Court of Wisconsin in *Mitchell vs. Mitchell*, 126 Wis., 47, 49, when it said:

"A will is not to be read in the light of rules for judicial construction merely because its meaning is challenged, and the challenge supported by reasoning on the assumption that such meaning is obscure. Often obscurity claimed to exist in such an instrument is but the mere creation of the mind of the claimant; not one originating with the maker of the paper."

Again, unless there is something in the particular will under consideration to lead to a contrary conclusion, the rule as to early vesting relied on by the appellee does not apply where after the determination of a precedent estate *real estate* is to be sold and the proceeds in the form of *money* paid over to certain classes of legatees.

In *Cripps vs. Wolcott*, 4 Maddock Ch., 12, 14, Vice Chancellor Sir John Leach had before him the question as to what was the period of survivorship where the bequest was to trustees to pay the income of personal property for life to one and after his death the principal to be paid to her two

sons and her daughter—naming them—“and survivor or survivors of them.” He said:

“It would be difficult to reconcile every case upon this subject. I consider it, however, to be now settled, that if a legacy be given to two or more, equally to be divided between them, or to the survivors or survivor of them, and there be no special intent to be found in the will, that the survivorship is to be referred to the period of division. * * *

“Here, there being no special intent to be found in the will, the terms of survivorship are to be referred to the death of the husband, who took a previous life estate.”

Cripps vs. Wolcott was followed in 1856 by Vice Chancellor Wood in a case where there was a gift of the estate to testator's wife for life and then a gift over to testator's five named cousins “or the survivor of them.”

Hearn vs. Baker, 2 K., K. & J., 386; 69 English Rep., 831.

The same principle was applied in *Stephenson vs. Gullan*, 18 Beav., 590; *Knight vs. Poole*, 32 Beav., 548, and *Hoghton vs. Whitgreave*, 1 Jac. & W., 146.

In *O'Brien vs. Dougherty*, 1 App. Cas. D. C., 148, real estate had been devised to the testator's wife for life, “after her death to revert to my surviving children.”

The principal question in the case was whether a child took under this devise who survived the testator but did not survive the life tenant. In holding that the remainder vested in the children on the death of the testator, Chief Justice Alvey, speaking for the court, reached the conclusion (not without much consideration of the authorities) that the doctrine of *Cripps vs. Wolcott* is not the law of this District in so far as devises of real estate are concerned. But he says, in part (p. 158):

"The case that has given rise to the supposition that, in cases of bequests of personal estate, at least, words of survivorship are *prima facie* to be referred to the time of distribution or enjoyment, rather than to the death of the testator, is that of *Cripps vs. Wolcott*, 4 Madd., 12, decided by Sir John Leach, Vice Chancellor, in 1819. In that case the Vice Chancellor said that he considered it to be then settled that if a legacy be given to two or more, equally to be divided between them, or to the survivors or survivor of them, and there be no special intent to be found in the will, that the survivorship was to be referred to the period of division. But if there be no previous interest given in the legacy, then the period of division was the death of the testator, and the survivors at his death would take the whole legacy. That case has been referred to and apparently followed in subsequent cases in England relating to personal estate.

"But the case of *Cripps vs. Wolcott* has been severely criticised as being an innovation upon a pre-established rule of construction, and it has met with decided opposition from courts of high authority. It has not been accepted in England as supplying a satisfactory rule of construction applicable to devises of real estate. The rule applicable to such devises rests upon decisions made long before, as also upon decisions made subsequent to that of *Cripps vs. Wolcott*. * * *

"And in the larger and more comprehensive work of Mr. Jarman, that on Wills, he reviews the decisions both prior and subsequent to that of *Cripps vs. Wolcott*, and after showing what the former rule was, he shows the present state of the English law to be, that where there is a gift of *personal estate*, to a person for life or any other limited interest, and after the determination of such interest to certain persons nominatim, or to a class of persons as tenants in common, and *the survivors of them*, these words are construed as intended to carry the subject of gift to the objects who are living at the period of distribution. But as to real estate, there is no such settled rule of construction, though there are cases in which

judges have said there should be no distinction in the application of the rule. 3 Jarm. on Wills, 573 to 580. And so Hawkins, in his work on Wills, 261, says that it is not yet settled whether the rule in *Cripps vs. Wolcott* applies to real estate, and that the older authorities are strongly in favor of referring survivorship to the testator's death, and he refers to the important case of *Doe vs. Prigg*, 8 B. and Cr., 231."

In 1 Jarman on Wills (Sixth American edition), star page 547, that author says:

"General Effect of a Constructive Conversion.—On the principle that equity considers that as done which ought to have been done, it is well established that 'money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given: whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money be actually deposited, or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed. The owner of the fund, or the contracting parties, may make land money, or money land.' It follows, therefore, that every person claiming property under a will or settlement directing its conversion, must take it in the character which such instrument has impressed upon it; and its subsequent devolution and disposition will be governed by the rules applicable to property of this character. This doctrine is founded in justice and good sense; since it would be obviously unreasonable that the condition of the property, as between the representatives of the parties beneficially interested, should depend on the acts of persons through whom, instrumentally, the conversion is to be effected, and in whom no such discretion is expressed to be reposed. The principle is, besides, too well supported by numerous authorities to be called in question at this day.

"Thus, money directed to be laid out in land, and

settled on A, in fee, is, though not actually laid out, descendible as real estate to the heir; is subject to tenancy by the courtesy; is not liable (otherwise than real estate is liable) to simple contract debts; and passes under a devise of lands, tenements, and hereditaments; and will not pass under a general bequest purporting to include personal estate only.

"So, in the case of real estate, whether freehold or copyhold, being directed to be sold, and the proceeds bequeathed to A, who, after surviving the testator, happens to die before the sale, the property devolves to his personal, not his real, representative, with all the incidental qualities of personal estate; but not so as to let in simple contract creditors.

"The doctrine, of course, applies where the ultimate destination of the property is to be reached by several gradations. Thus, land directed to be sold, and the proceeds to be invested in land will, though neither conversion has been actually effected, be regarded as real estate."

In *Peter vs. Beverly*, 10 Peters, 532, 563, this court said:

"It is a well-settled rule in chancery, in the construction of wills as well as other instruments, that when land is directed to be sold, and turned into money, or money is directed to be employed in the purchase of land, courts of equity, in dealing with the subject, will consider it that species of property into which it is directed to be converted. This is the doctrine of this court in the case of *Craig vs. Leslie*, 3 Wheat., 577; and is founded upon the principle, that courts of equity, regarding the substance and not the mere form of contracts and other instruments, consider things directed, or agreed to be done, as having been actually performed."

In *Cropley vs. Cooper*, 19 Wall., 167, 174, Mr. Justice Swayne, speaking for the majority of the court (there being no dissent on this point), said:

"The real estate having been directed by the will to be converted into money, it is to be regarded for

all the purposes of this case as if it were money at the time of the death of the testator. That it was not to be sold until after the termination of two successive life estates does not affect the application of the principle. Equity regards substance and not form, and considers that as done which is required to be done. The sale being directed absolutely, the time is immaterial."

In *Robertson vs. Guenther*, 241 Ill., 511—a case which was decided in October, 1909—it was held that under a conveyance to one for life and *at her death to her children surviving her*, the remainder to the children is contingent until her death. In an elaborate note to this case in 25 L. R. A. (N. S.), 887-904, there is a complete review of the numerous cases in which the question has been whether language similar to that used in that case and in *O'Brien vs. Dougherty*, *supra*, makes the interest taken by the "surviving" beneficiaries vested or contingent. About one hundred cases are cited in the note. In all except seven of the cases it was held that the remainder was contingent, and in those seven cases it was held that it was contingent subject to be divested by the death of the beneficiary before the termination of the preceding estate. The seven excepted cases are *Hudgens vs. Wilkins*, 77 Ga., 555, and *Blanchard vs. Blanchard*, 1 Allen, 223 (which are referred to on page 888 of the L. R. A. report); *In re Seamen*, 147 N. Y., 69 (899); *Nodine vs. Greenfield*, 7 Paige, 544 (900); *Parker vs. Ross*, 69 N. H., 213 (902); *Smaw vs. Young*, 109 Ala., 528 (894); and *Acree vs. Dabney*, 133 Ala., 437 (904).

The following is an extract from the preliminary statement contained in this note (p. 889):

"To the test above stated should perhaps be added the familiar rule that in doubtful cases the courts will favor a construction which regards an estate as vested. Of this rule it may be remarked in passing that its application has not always been confined to cases in which the actual intention of a grantor or testator

was otherwise impossible of ascertainment, but that it has been in effect applied as though it created a presumption in favor of vesting which could be overcome only by clear evidence of an actual intention to the contrary. This tendency has been perceived by the courts themselves, which, in their later decisions, seem to have striven to correct it.

"Where, then, it is determined that it was the intention of the creator of a remainder to make surviving the life tenant a condition precedent to vesting, the case will then fall within the fourth group of Fearne's classification; *i. e.*, 'Where a remainder is limited to a person not ascertained, or not in being at the time when such limitation is made.' Fearne, *Contingent Remainders*, *9.

"The fact that all the persons in the class are mentioned by name instead of being simply designated as a class does not make any difference in their rights, so long as the devise or conveyance is only to such of the persons named or of the class as may be alive at the expiration of the life estate. *Haward vs. Peavey*, *supra*; and see also *Chapin vs. Crow*, 147 Ill., 219; 37 Am. St. Rep., 213; 35 N. E., 536; *Brechbeller vs. Wilson*, 228 Ill., 502; 81 N. E., 1094; *Thomson vs. Ludington*, 104 Mass., 193; *Whiteside vs. Cooper*, 115 N. C., 570; 20 S. E., 295.

"As above noted, an element of confusion has been introduced by the statutory definition of a vested remainder, found first in the statutes of New York, and by the effect given thereto by the courts of that State. This will now form the subject of consideration.

"To obtain a full understanding of the situation, it is necessary to go back to a statement made by Fearne (*216), in discussing the principle that the uncertainty of a remainder's ever taking effect in possession does not make a remainder contingent, if, in other respects, it have the essential requisites of a vested remainder: 'The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested re-

mainder from one that is contingent.' This statement has been criticised (see *Howbert vs. Cauthorn*, 100 Va., 653; 42 S. E., 683) as being open to exception in omitting to add, after 'taking effect in possession,' the words 'of an already existing and ascertained person;' but this criticism is accompanied by the statement that the whole tenor of Fearne's discussion shows that this was intended. And Washburn, in his work on Real Property [§1543], in commenting upon Fearne's statement, says: 'By capacity, as thus applied, is not meant simply that there is a person *in esse* interested in the estate, who has a natural capacity to take and hold the estate, but that there is further no intervening circumstance, in the nature of a precedent condition, which is to happen before such person can take.'

"Fearne's statement would seem to have been in the mind of Chancellor Kent when he said (Com., *202): 'The definition of a vested remainder in the New York Revised Statutes appears to be accurately and fully expressed. It is, "when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate."' This remark seems to have misled the court of other jurisdictions—notably the United States Supreme Court and the courts of Alabama and New Hampshire, and perhaps some others, into accepting the decisions of the New York courts under the statute in question as expository of the common law, although the New York courts themselves regarded the Revised Statutes as a simplification, rather than as a codification, of common law doctrines.

* * * * *

"And *In re Moran*, 118 Wis., 177; 96 N. W., 367, it is said: 'With the characteristics of a vested estate at common law clearly in mind, one may easily observe, upon reading the statute, that there was no purpose to embody therein in its entirety the common law idea.'

"But whether the position thus taken by the New York courts was correct is at least in doubt. Thus, in *Smaw vs. Young* [109 Ala., 528], *supra*, in

which the question was ably examined, it is demonstrated by excerpts from his Commentaries that Chancellor Kent had constantly in mind, except when formulating his approval of the New York definition, and in every pertinent connection expressed the idea, that one essential constituent of a vested remainder is that the right to take in the future should be fixed pending the preceding estate; and that throughout he intended by the use of this word to imply that the person ultimately to take in possession should be ascertained and identified; and that when the right to take upon the falling in of the life estate is not so fixed—when the person nominated to take is uncertain, unascertained, and unidentified during the particular estate—the remainder is contingent, and is not vested; so that it is clear that while Kent may have been inadvertent in approving the definition of the New York Revised Statutes, he was not himself led away from the fundamental requisite of certainty as to the identity of the remainderman in the constitution of a vested remainder. And it is further stated that while the New York definition of a vested remainder, standing by itself, is doubtless open to the interpretation of it which has been adopted by the courts of that State, yet, when the whole section of the statute of which this definition is only a part is read, it is exceedingly doubtful whether the courts or Kent are in error about it; and that construing together the two definitions contained in the statute: 'Future estates are either vested or contingent. They are vested when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom or the event upon which they are limited to take effect remains uncertain'—it would seem that the latter excludes from the former all cases in which the remainderman is not ascertainable during the particular estate, so that the former could not embrace estates limited to take effect to such of the children of B as should be living on the death of A, the life tenant, merely because B had children in life during

the particular estate, who would have an immediate right of possession should the possession become vacant, as it has been construed by the courts.

"The theory that the Revised Statutes were not meant to change the common law on vesting is also advanced in *Chaplin*, *Suspension of the Power of Alienation*, §§ 28-52.

"But the view that the statutory definition of a vested remainder makes the ascertainment of the person who is to take unnecessary to render the remainder vested, for all purposes, provided there is a person in existence who would be entitled to take if the precedent estate were at any time to cease, seems to be no longer recognized in that State—except, perhaps, so far as the question of the unlawful suspension of the power of alienation may be involved. See *Purdy vs. Hayt*, 92 N. Y., 447; *Hall vs. La France Fire Engine Co.*, 158 N. Y., 570; 53 N. E., 513; *Sanson vs. Bushnell*, 25 Misc., 268, 55 N. Y., Supp., 272. The case of *Moore vs. Littel*, *supra* [41 N. Y., 66], upon which such view rested, while not expressly overruled, seems to have been in this connection pretty well discredited. It was with reference to this case that Judge Grover, the author of the dissenting opinion therein, is reported to have jocosely remarked that the reason why the people of the State of New York abolished the old court of appeals and created a new court was that the old court did not know the difference between a vested and a contingent remainder. And in *Hennessey vs. Patterson*, 85 N. Y., 91, Finch, J., said that the rule stated in *Moore vs. Littel*, that where the same event at the same time, *eo instanti*, terminated the precedent estate, and settled the contingency, the remainder was vested, was not assented to by three of the judges, and the case was really decided upon the ground that the remainder was contingent, but nevertheless an expectant estate, as defined by the Revised Statutes, and, as such, alienable. The construction placed upon the statute by Woodruff, J., in *Moore vs. Littel*, is also criticised in an article in 1 *Columbia L. Rev.*, 279.

"In Wisconsin, in which a statute similar to that of New York has been adopted, an attempt has been made to solve the difficulty occasioned by the statutory definition of a vested remainder by holding that while the statute deals plainly with limitations upon the right absolutely to suspend the power of alienation, it does not deal, either as a rule of evidence or otherwise, with the meaning of testamentary or contractual words as regards when title is or is not vested, respecting anything but limitations upon the right absolutely to suspend the power of alienation, and the other features found in the statute; and therefore that the fact that an estate in remainder may be vested within the terms of the statute means only that it is to be regarded as vested so far as any question of suspension of the power of alienation is involved, and does not prevent it from having the characteristics of a contingent remainder at common law if such was evidently the intention of the creator of the remainder. See *re Moran, supra*."

4. *As to the rule where partial intestacy may result.*

Another of the rules of construction that appears to be somewhat relied upon by counsel for the appellee is that a construction which may result in partial intestacy is to be avoided.

This seems to be based upon the idea that if before Eliza Thomas Berry died all her sisters had died, leaving no descendants, there would have been an intestacy as to the property in question.

In the first place, it is not admitted that in such an event there would have been any intestacy. As has already been shown, Metropolis View, for the purposes of the will in question in this case, is to be considered as personal property, and as such it would pass under Item 6th of the will, which directs that the residue and remainder of the testator's personal estate shall be divided and distributed by the executors among the testator's children and their descendants. There

would have been no intestacy unless all the sons, as well as all the daughters, had died without issue before the last surviving daughter died unmarried—a contingency so improbable that the testator might be excused for not considering it.

Again, if construction is to be resorted to in order to avoid possible intestacy it would be easy to say that the daughters took vested interests in fee simple subject to be divested by their dying leaving issue surviving. Under such a construction Eliza T. Berry's one fifth interest will have passed to the purchasers in Equity Cause 500, because her heirs would be estopped to claim it.

But aside from this, it would seem that the language of a will which gives property to certain persons and to their children upon the happening of a future event should not be distorted into a gift to those persons to the exclusion of their children because of the possibility that they may not have any children.

The Court of Appeals of Kentucky, in *Augustus vs. Seabolt*, 3 Metc., 155, said:

"Another settled rule of construction is, that when a testator, in the disposal of his property, overlooks a particular event, which, had it occurred to him, he would probably have guarded against, the omission will not be supplied by implying or inserting the necessary clause, for, as it is said, 'it would be too much like making a will for the testator, rather than construing that already made.' Although the inference of intention be more or less strong, yet if not necessary or indubitable, the court will not for the same reason, aid the supposed intention by adding or supplying words (*Roper on Legacies*, 327, 328)."

So, in *Matter of Disney*, 190 N. Y., 128, the court said (p. 131):

"To my mind the language used is clear and unambiguous, and leaves but one conclusion, and that is, that inasmuch as the mother did not die without issue her surviving, the contingency provided for in

the will did not occur, under which the survivor Fannie was entitled to take the whole. When the language used is as clear and unambiguous as it is in this case, it does not appear to me that we should evade its meaning by an endeavor to spell out a different intent on the part of the testator by resorting to the rule, to the effect that the testator did not intend to die intestate, especially when that rule has many exceptions and is only occasionally followed. The subject has received careful consideration in the opinion of Ingraham, J., in the Appellate Division, and we, therefore, deem further discussion unnecessary."

3. When there is a devise to parent and children—as to parent and descendants—without more, the parent takes a life estate with remainder to such children or descendants.

Of the many cases which deal with gifts to parent and children, or the like, the following are cited as directly in point:

After other gifts, a testator required every legatee to pay one per cent of his legacy to "Mrs. Horatio Ward and her children."

By a codicil he gave other legacies and required those legatees to pay one per cent to Mrs. Ward "and her family."

It was held by Lord Romilly, Master of the Rolls, that Mrs. Ward took a life estate in these bequests with a power of appointment among her children, and that in default of such appointment they, on her death, took the bequest "equally among them."

Ward *vs.* Grey, 26 Beavan, 485 (1859).

Bequest to a woman for the benefit of herself "and such children as she then had, or might thereafter have by her then husband free from the control of her husband."

The Master of the Rolls, Lord Romilly, as to this provision said:

"All the children were intended to take, and I agree that this can only be effected by giving a life interest to the mother, and the fund afterward to the children."

Jeffery vs. De Vitre, 24 Beav., 296 (1857).

Devise to M. J. and to all and every the child and children whether male or female of her body lawfully issuing, and unto his, her or their heirs as tenants in common.

This was held to give M. J. a life estate in the real estate in controversy, with remainder to her children as tenants in common.

The Vice Chancellor (Sir John Leach) said:

"It is plain that afterborn children would be included in this devise; and it is a singular intention to impute to a father, that he means his daughter's personal interest in the estate should continually diminish upon the birth of a new child."

Jeffrey vs. Honeywood, 4 Madd. Ch., 397.

In *Hall vs. Hall* (78 Atl. Rep., 971)—a case decided by the Supreme Court of Vermont in 1910—there was a devise to the testator's widow, "her heirs, viz: her children and grandchildren and assigns." It was held that the widow took an estate for life only. The court said:

"The doctrine stated by Lord Hobart, and restated by Sergeant Williams, has been reiterated by many text writers, and has been the basis of numerous decisions, and we entertain no doubt of its soundness. Very clearly, too, it appears here; and since the words 'children and grandchildren' designate a class of heirs, they operate to limit the estate of a parent to an estate for life, unless they are prevented from having that effect by the words 'and assigns,' which follow them. The effect of the words 'and assigns' was not referred to in argument; but we have given those words due consideration. * * * counsel were justified in basing no argument upon their use.
* * *

"Several Kentucky cases are cited by the appellant,

and more from that State might be referred to; for this subject has many times been forced upon the attention of the Supreme Court of Kentucky, and the individual cases there arising have been dealt with in accordance with sound and sensible doctrines. We note that there, when a devise is to a wife and her children, whatever the form of the expression used, it is, with that court, to use its own language, 'the constant and uniform tendency * * * to hold that the wife takes a life estate only, and that the children take in remainder.' In the absence of anything in the instrument to indicate a different intention, that court infers that, where a wife and children are named, such a holding is more consonant than any other with the wishes of the testator. *Hood vs. Dawson*, 98 Ky., 285; 33 S. W., 75" (p. 972).

Devise to daughter "to be hers and her child's or children's forever."

This was held on great consideration to give the daughter a life estate with remainder to her children. Many English cases are cited by the court in support of its conclusion.

Noe's Adm'r vs. Miller, Ex'c'rs, 31 N. J. Eq., 234.

A trust deed contained the following clause:

"In trust * * * for the sole use * * * of * * * my wife * * * during her natural life and my four children * * * and any future children I may have by my said wife."

It was further provided that if the grantor's wife should remarry after his death the property was to go to his children.

It was held that the wife took an estate for life and the children a remainder in fee; and that although he named four children living when the deed was made those afterwards born were entitled to their share—the ground being that while the general rule is that a devise to children by name indicates that they take as individuals and not as a

class a contrary intention may be gathered from the context.

Stiles vs. Cummings, 50 S. E. Rep., 484 (Ga.).

Devise to daughter-in-law and her children "in consideration for the love and affection I have for her and in consideration of her kindness to me heretofore."

In this case it is taken for granted that the children take, the only question being whether those born after the testator's death should share with those born before. It was held that they did. While it is not expressly so stated in the opinion, this necessarily implied that the daughter-in-law took a life estate only.

Logan vs. Hall, 43 S. W., 402 (Kentucky, 1897).

Devise in trust for various purposes including the benefit of a son. As to his share one-fifth was to go to him at 21, three-fifths at 28 (subject to delay if the trustees thought best); "the remaining one-fifth part of his share shall be held in trust by my executors for the benefit of my said son George and his direct descendants."

It was held that the word "descendants" could not be construed as heirs, or heirs of his body, so as to give a fee or a fee tail; but that he took the income for life, with remainder to his children.

George had no children when the suit was brought. The court says: George at present is the only beneficiary, but his estate is subject to be divested to let in after-born children.

Ballantine vs. Ballantine, 152 Fed., 775 (Cir. Ct., Dis. of New Jersey, Cross, D. J.).

Devise to "my son Matthew and to his children." Held, to give Matthew a life estate with remainder to his children.

It is said that the word children has and has had a well-defined meaning, "upon the proper adherence to which mean-

ing the stability and very existence of many titles in this Commonwealth depend."

The court goes over the will and finds no place in which the word "children" is used in the sense of "heirs," and says that he who seeks to give the word "children" other than its ordinary meaning "must assume the burden of showing cogent and convincing reason to justify the departure."

Forest Oil Co. vs. Crawford, 23 C. C. A., 55.

(Opinion by Buflington, District Judge, adopted in Circuit Court of Appeals by Dallas and Acheson, circuit judges, and Wales, district judge. The Supreme Court of Pennsylvania gave the same construction to this will. *Crawford vs. Forest Oil Co.*, 208 Pa., 5.)

Devise to trustees for the benefit of the testator's daughter and son, for them and their children, should they have any, creates a life estate in each of the testator's children in an undivided half of the property, with remainder in fee to any children who might be born to either, and neither creates an estate in cotenancy between them and their children nor limits the remaindermen to children in being at the testator's death. The interest of the grandchildren vests as soon as the first one is born, opening to let in those born afterward.

Barclay vs. Platt, 170 Ill., 384.

Devise to daughter, adding, "I give this farm to her and her children, to be theirs with all its appurtenances." Held, to give the daughter a life estate with remainder to her children.

Kuhn vs. Kuhn, 68 S. W. Rep., 16 (Ct. App. Ky., 1902).

Devise of all testator's property to his daughter "and her children."

Held, that the daughter took an estate for life, with remainder to her children.

In the opinion in this case the court refers to four prior cases in Kentucky in which almost the same language was used and the same conclusion reached.

The reasoning of the court as to why in such cases a joint tenancy is not created is convincing. It is in part as follows:

“At the date of the will in controversy Mrs. Sims only had one child, while at the date of its probate she had four. If testator had died immediately after the execution of his will, his daughter would have taken an undivided half of his estate, while, if she had taken at the date of the probate, her interest would be reduced to one-fifth, and might, in the event of after-born children, be still further reduced. It would be well-nigh impossible under any other rule of construction to effectuate the intention of a father or husband to provide for a daughter or wife and living and after-born children alike.”

Simms vs. Skinner's Executors, 81 S. W. Reporter, 703 (Ky.).

In this connection counsel for the appellee refer to Wild's case (6 Rep., 17) as holding that when at the time a gift to parent and children vests in possession there are no children the parent takes an estate tail. But that case has no application here, because when this remainder vested in possession there *were* children. In Wild's case there was a parent living, but no children. In this case there were children living, but no parent.

II.

THE INTERESTS OF THE CHILDREN OF WASHINGTON BERRY'S DAUGHTERS WERE NOT IN ANY WISE AFFECTED BY THE PROCEEDINGS IN EQUITY CAUSE No. 500 OR BY THE CONVEYANCES MADE BY THE TRUSTEES APPOINTED IN THAT CASE.

The bill in equity cause No. 500 was filed on the 28th day of August, 1865 (15). The plaintiffs in the suit were the three adult married daughters of the testator and their husbands. The defendants were the unmarried daughter Eliza Thomas Berry; the minor daughter and her husband; the three sons of Washington Berry, and the respective wives of the two sons who were married. On the date of the filing of the bill Washington Berry's daughter, Anna Maria, and her husband, John Alexander Middleton, had a living child, John Alexander Middleton, Jr., who was born on the 12th of February, 1857 (40, 64), and his daughter Amelia Owen and her husband, Allen Lucien Berry, then had two living children, one of whom was born June 30, 1861, and the other February 13, 1863 (40, 62). They are all among the appellants in this case.

No one of these children was made a party to the suit [see stipulation of counsel as to this, page 45 of the record in this case], nor was the fact of their existence when the bill was filed brought to the notice of the court in any way from the beginning to the end of that proceeding. With what little care the bill was prepared may be judged from the fact that the draughtsman omitted the jurisdictional averment that the widow was dead. That fact first appeared in the report of the auditor (20, 22). The date of her death does not appear at all. All the defendants filed formal answers admitting the averments of the bill except the testator's daughter, Rosalie Eugenia, who was only eighteen years of age. An answer for her was filed by her husband, John B. N. Berry, which merely submitted her rights to the court (25).

The case was then referred to the auditor, with instructions to take testimony and report to the court "whether the sale of the real estate in the bill mentioned will be for the interest and advantage of the infant defendant in said cause" and for no other purpose (18). It is quite apparent that if it had not been that one of the daughters of the testator was under age the sale would have been made upon the pleadings in the case without any inquiry by the court at all. The auditor's report was filed on the 27th of September, 1865 (24). He reported that he was satisfied that it would be to the interest of the parties to have the property sold; and that it was a fit case for a sale. He assumed, without discussion or consideration, that the daughters had the entire interest and the claims of the children of the daughters were ignored in the report of the auditor as they had been ignored in the prior proceedings in the case.

On the third of October, 1865, the court appointed John A. Middleton, the husband of one of the daughters, and Thomas W. Berry, one of the testator's sons, trustees to sell the property, authorizing them to divide it into parcels in their discretion. In this decree the court provided that upon the final ratification by the court of any such sale the trustees should convey to the purchaser in fee simple the property sold "*free clear and discharged from all claim of the parties to this cause or any person or persons claiming by, from or under them.*" This language is quite significant. A judge signing a decree which on its face authorizes a conveyance of the interest only of the parties who are actually before the court would not be likely to make an independent investigation of his own not suggested by the pleadings, as to whether there were any other parties who might have an interest in the land sold. If there were such parties his decree did not even purport to affect their rights.

Notwithstanding the conclusion reached by the Auditor and the testimony of the witnesses upon which he based his conclusion, that it was important for the interest of everybody concerned that the land should be sold, the trustees

were very slow in making sales—so slow that two years and a half after the final decree directing a sale was made, two of the daughters, Mary Elizabeth Louise, and her husband, E. Dorsey Johnson, and Rosalie Eugenia and her husband, John B. N. Berry, filed a petition in the case setting forth that the trustees had sold only thirty-six out of the four hundred and ten acres, which comprised the homestead, and that they declined to sell the rest because they thought it would “produce more money if sold at some future time” (28-29).

One of the reasons given by these two daughters and their husbands for urging an immediate sale in 1868, was that they had “families and children to support and are in need of the money” (28). John B. N. Berry, the husband of one of these petitioners, was examined as a witness in this case and from his testimony it appears that the only child that he and his wife had when this petition was filed, in 1868, was one son, who was then eighteen months old (61). The other petitioner, Mary Louise Johnson, and her husband, at that time had but one child, who was then ten months old (40-63).

Between the date of the original decree appointing trustees and directing them to sell, October 3, 1865, and the filing of this petition on April 22, 1868, several other children had been born to daughters of Washington Berry, who were not parties to that petition. To Anne Maria Middleton in that interim had been born twins on November 4, 1867 (40), both of whom are still living and are appellants here. John H. Berry, who was one of the appellants when this case was brought to this court, but who died a few weeks ago, and who was a son of Rosalie Eugenia Berry, was born on the 14th of October, 1866.

On May 2, 1868, the court signed an order saying that it seemed to be reasonable that the prayer of the petitioners for an immediate sale should be granted, and it was accordingly ordered on that day that the trustees proceed to advertise

and sell the rest of the property mentioned in the former decree (30).

It has not been thought necessary by any of the parties to incorporate in the record in this case the various reports of sales which were thereafter made by the trustees and the orders confirming them. All that was essential in this case on that subject appears in the statements made in the record in the fourth paragraph of the original bill in this case (6, 7), which statements the appellants in their answers to the bill admitted to be true (41). In this way it appears that the property was subdivided into thirty-six lots, nineteen of which were conveyed by the trustees either to some of the daughters or their husbands; and seven of the remaining lots were conveyed to Mr. W. D. Davidge, now deceased, the lawyer who conducted the case. The appellee claims under Davidge

It would seem that counsel for the appellants should not be required to spend much time in arguing that the interests in real estate of children of tender years cannot be disposed of by a proceeding to which they are not parties and in which they are not represented, but which is conducted wholly by those whose interest it is to deprive the children of their rights. And still less is argument needed to show that the rights of children yet unborn may not be taken away in a proceeding in which there is no one to speak for them.

Counsel for the appellee does not claim in his brief that the rights of the appellants are affected directly by the proceedings in or under equity cause 500. On page 60 of his brief he says that in equity cause 500 the court necessarily put upon the will of Washington Berry the construction for which counsel contends here as "otherwise it "would have been without jurisdiction to decree a sale of "Metropolis View."

This is curious reasoning. How a court can dispose of the rights of parties not before it by deciding without hearing them that they have no rights passes understanding.

Counsel for the appellee maintains that by the action of

Eliza T. Berry, the unmarried daughter, in appearing in equity cause 500, waiving her life estate under the will of her father and consenting to a sale of the homestead and an equal division of the proceeds of the sale between herself and her four married sisters, the remainder to the daughters and their children and descendants was "accelerated," and the children of the daughters cut out even if they would have been entitled to all the proceeds of the sale on the death of Eliza T. Berry if she had not so renounced. In other words, as counsel suggests in his brief (p. 49), her action in equity cause 500 was the equivalent of a deed from her to the remainderman, "herself included," conveying the life estate, whereby "the life estate became merged in the fee." Hence, equity cause 500 is invoked as the equivalent of an agreement by the daughters out of court to divide among themselves that which was given to them and their children.

Before considering this question of acceleration reference will be made to two leading cases in which, as in this case, it has been held that purchasers under a decree made in the absence of children or grandchildren whose interests the decree was supposed to affect were held to take, and to be able to transmit to others, only the interests of those who were parties to the suit in which the decree was made.

In *McArthur vs. Scott*, 113 U. S., 340, a will was construed in which interests in real estate were devised to children and grandchildren of the testator in such wise that some of the grandchildren took a vested but defeasible remainder, the provisions of the will being such that the persons who would be entitled finally to the land devised or its proceeds could not be determined until the testator's youngest grandchild, who might live to be twenty-one years of age, should arrive at that age. There had been a proceeding in the court where the will had been admitted to probate to set it aside. When

the bill to declare the will void was filed there were a number of grandchildren living, *all of whom were properly made parties to the proceeding and served with process.* They were all minors and their respective parents, whose interests were adverse to them, were appointed their guardians *ad litem*. A decree was entered setting aside the will. Subsequently the heirs of the testator in partition proceedings had the land divided up among themselves. It was afterwards subdivided and went in parcels into the hands of various purchasers. Thirty-five years afterwards, when the time fixed in the will for distribution had arrived, a number of the grandchildren who were not in existence at the time of the proceeding which resulted in a decree declaring the will to be null and void filed a suit against the various persons who were in possession of the land under titles derived through the partition proceedings. One of the principal questions involved was whether the rights of the plaintiffs were affected by the proceedings in the probate court vacating the will or by the subsequent partition proceeding. On that subject Chief Justice Gray, delivering the opinion of this court, said (pp. 391, 394, 395, and 404):

"The general rule in equity, in accordance with the fundamental principles of justice, is that all persons interested in the object of a suit, and whose rights will be directly affected by the decree, must be made parties to the suit. Exceptions to this rule have been admitted, from considerations of necessity or of paramount convenience, when some of the persons interested are out of the jurisdiction, or not in being, or when the persons interested are too numerous to be all brought in. But in every case there must be such parties before the court as to insure a fair trial of the issue in behalf of all. * * *

"The only parties to that proceeding, who were of age and capable of representing themselves, were the heirs at law, interested to set aside the will, and one of whom, afterwards father of the present plaintiffs,

filed the bill for that purpose. The guardian *ad litem*, appointed to represent the opposing interest, under the will, of each minor grandchild then in being, was either its parent, interested as an heir at law, and as a party to the suit in his own right, to defeat the will, or was the husband of such a parent and heir at law. Each of the persons so appointed confessed in the answer filed in his own behalf all the allegations of the bill, and in his answer as guardian neither admitted nor denied those allegations. All the appointments of the guardians *ad litem* were made, all the answers were filed, and the issue to the jury was ordered, in that suit, and the resignation of the sole remaining executrix (who was also one of the heirs at law and guardians *ad litem*) was tendered and accepted in the court of probate, on one and the same day, within a week before the verdict and final decree.

"The charges, made in the present bill, of actual fraud and conspiracy in procuring that decree, having been denied in the answers, and the plaintiffs, by setting down the case for hearing upon bill and answers, having admitted the truth of all statements of fact in the answers, must be taken to be disproved. Those who took part in obtaining that decree may have thought that they were doing the best thing for all persons interested in the estate. But it is impossible to read the record of that case without being satisfied that the verdict and decree were entered without any real contest, and that the heirs at law, whose interest it was to set aside the will, in fact controlled both sides of the controversy: the attack upon the will, as heirs and as parties in their own right; the defence of the will, as guardians *ad litem* of the only devisees brought before the court.

"The appointment of persons, having adverse interests, to be guardians *ad litem* of the grandchildren then living and made parties defendant, may, so far as those parties were concerned, have been a mere irregularity in the mode of proceeding, for which they could not afterwards collaterally impeach the decree. *Colt vs. Colt*, 111 U. S., 566. But neither the living grandchildren, nor the guardians ap-

pointed to represent them, could represent the estate devised by the testator to his executors in trust for unborn grandchildren and great-grandchildren.

* * *

"In the proceeding to contest the validity of Duncan McArthur's will, on the contrary, so far from the attention of the court being called to any such question, it was positively alleged in the bill, and not contradicted in any of the answers, that those named as parties in the bill were the only persons specified in that will, and the only persons having an interest in it. Under the Ohio statute and decisions, the court had nothing to do with the construction or the legal effect of the provisions of the will, but had only to try the question of will or no will as between the parties before it, and with no effect upon the rights of those not made parties. The rights of those infant grandchildren who were made defendants, to show cause against the decree, were saved by the express terms of the statute and of the decree itself until their coming of age and for six months afterwards; and no provision was made for the preservation of the rights of after-born grandchildren. * * *

To extend the doctrine of constructive and virtual representation, adopted by courts of equity on considerations of sound policy and practical necessity, to a decree like this, in which it is apparent that there was no real representation of the interests of these plaintiffs, would be to confess that the court is powerless to do justice to suitors who have never before had a hearing.

"The subsequent partition among the heirs at law, and the conveyances by them to third persons for valuable consideration, cannot affect the title of these plaintiffs. All the facts upon which that title depends appeared of record in judicial proceedings, of which all persons, whether claiming under or adversely to the will, were bound to take notice. The will and the original probate thereof were of record in the county in which the probate was granted. The will as there recorded showed the estate devised to these plaintiffs and to the executors in trust for them. The recording of the will and probate in any

other county in which there was land devised was required for the purpose of evidence only, and not to give effect to the probate. *Hall vs. Ashby*, 9 Ohio, 96, 99; *Carpenter vs. Denoon*, 29 Ohio St., 379, 395. The record of the decree setting aside the will showed that neither these plaintiffs, nor any executors or successors of executors in the trust, were parties to the suit; and consequently that the plaintiffs' title under the will, as originally admitted to probate, was not affected by that decree. The subsequent purchasers must therefore look to their vendors, and have no equity as against these plaintiffs. Even a purchaser of land sold under a decree in equity, though he is not affected by mere irregularity in the mode of proceeding against the parties to the suit in which the decree is rendered, yet, as has been observed by Lord Redesdale, and repeated by the Supreme Court of Ohio, is to see that all proper parties to be bound are before the court, and that taking the conveyance he takes a title that cannot be impeached *aliunde*. *Bennett vs. Hamill*, 2 Sch. & Lef., 566, 577; *Massie vs. Donaldson*, 8 Ohio, 377, 381."

The other case referred to is *Long vs. Long*, 62 Md., 33. The testator in that case, Kennedy Long, died in 1824, leaving six children, some of whom were then under age. He owned certain real estate in or near the limits of Baltimore called in his will the "dwelling place."

He devised all his real estate to four trustees and the survivor "for the benefit of, and to be equally divided between all and every the children I now have and the child or children I may hereafter have and their descendants" in manner following:

That his daughters, including Amelia J. Long, should have the income for life, remainder equally to their respective children:

If any child died under age, such child's share was to go to the surviving children:

The will forbade the sale or lease of the dwelling place

during his wife's life and until the testator's youngest son came of age:

It gave to the trustees or the survivor of them full power to make partition of the estate among the devisees.

The widow renounced. Three of the four trustees did not accept as executors or as trustees.

Henry Long became the sole trustee. He removed to Illinois and in the absence of supervision the "dwelling place" suffered detriment for lack of proper management.

In March, 1833, the widow and all the children except Amelia J., who was still under age, filed a petition in the proper court to have the trustee removed and the place sold and the proceeds paid to the parties entitled. The trustee answered consenting to his own removal, but he did not join in the application for the sale or admit that a sale was wise or proper. Amelia J., the infant defendant, by her guardian, in her answer, consented to the sale. The court found that the property was in bad condition and that it was to the interest of all concerned to have it sold. Long was removed as trustee and a new trustee was appointed by the court. Through the new trustee a sale was made and approved and a deed given to the purchaser conveying the land free from all claims of the parties to the cause or those claiming under them. Many subsequent sales were made, and the property became a suburb of Baltimore. The proceeds of sale were invested by the court for the benefit of the tenants for life and of those in remainder after the death of the life tenants. Some of the remaindermen received their share of the principal fund after the death of their parent.

In 1880—more than 40 years after the foregoing proceedings—a bill was filed by some of the grandchildren, and others were made defendants. The numerous owners and occupants of the property were also made defendants. In this suit the grandchildren claimed their shares of the property as though it had never been sold after the testator's death.

It was held by the court (per Alvey, C. J.):

1. That the court which ordered the sale had jurisdiction to make the sale notwithstanding the prohibition in the will, but that the plaintiffs were not represented in the proceedings in which the sale was made.

2. That although the court in those proceedings did what it considered for the interest of all concerned in converting the real estate into money and letting the fund stand for the property sold, if what was done was without authority of law, then though it might operate as a great surprise and hardship upon innocent parties the court was compelled to uphold the rights of those illegally dealt with.

3. That while the heirs at law of the testator held the legal fee in the shares of the realty devised to the grandchildren until those grandchildren should come into being, they did not represent the grandchildren and that therefore as to the real estate they were not represented at all.

4. Neither limitations nor laches barred the suit.

5. That the grandchildren who received their share of the proceeds of sale were estopped to claim that the sale was invalid.

6. That the others were entitled to their share of the real estate with allowance to occupants for improvements.

In this Maryland case the court did not (as was done in this case) undertake to give the proceeds of the sale to the holders of the precedent estates to the exclusion of the ultimate remaindermen, but merely converted the realty into personalty for the benefit of *all* the devisees. Yet the sale was held void as to remaindermen who were not represented in the suit, and did not, in person, receive their share of the proceeds of the sale.

Assuming now that the proceedings in equity cause 500 considered as a judicial proceeding merely does not help the appellee, it remains to be considered whether under the rules relating to the acceleration of remainders that cause destroyed the interests of the appellants in Metropolis View because it amounted to an agreement between their respective mothers and Eliza T. Berry to "advance" the time of the sale fixed by the will.

It is important at the outset to have a clear understanding of what in this regard is the contention of the learned counsel for the appellee as to the rule of law which he invokes.

His claim is that the daughters of Washington Berry, after the death of their mother, had the right to surrender or to refuse to accept the estate which was given them respectively for life or until marriage and that upon their doing so while they were all living, the intention of the testator that his grandchildren by his daughters should take the property if that should happen which did occur, would be frustrated.

That is to say, when the widow died the five daughters in this way could take to themselves that which their father had given to them and their children; when one of them died the remaining four and the administrator of the deceased daughter would have the same right; and so of the three who might survive and of the two who might survive and of the last survivor. If this right existed at all it never ceased to exist until the last daughter was dead. When all her sisters had gone Eliza T. Berry could have surrendered her life estate and in that way could have absolutely excluded all the children of her four deceased sisters from direct participation in the division of the property or of the proceeds of its sale—taking at least one-fifth of the property or its proceeds to herself. And this power she would have had the day before she died.

It would seem not to be necessary to go very far in the examination of the authorities to determine whether this is the law. But as counsel for the appellee has devoted so much

space to his argument on this point and to the citation of authorities which he thinks support his contention the undersigned submits a reference to some of the cases bearing on the subject:—

Very pertinent in this connection is the case of *Marshall vs. Augusta*, 5 App. D. C., 183, 194. In that case there was a devise to a daughter for life, remainder to her children. The gift was of an undivided fourth part of testator's estate—the other three-fourths going to other children of the testator.

After the testator's death his four children made partition by deed. Subsequently there were two suits in equity to sell the interest of two of these four children as their interests stood under the partition.

The children of the daughter brought ejectment after her death. It was held that the partition proceedings were void as to them. The court said:

“What she [the daughter] did she purported to do exclusively for herself, and not at all for her children; and so far as we are informed by the record, it is not apparent that the piece of property which was set off to her, in fee simple, might not have been regarded as the equivalent in value of her life interest in the one-fourth undivided part of the testator's estate. The children were entirely ignored in this alleged partition transaction; and yet, if upon the death of Benjamin Newton they became immediately entitled to a vested remainder, in fee simple, in the one-fourth undivided part of his estate, as it is very clear to us that they did, it is not quite apparent to us how that vested remainder could be shifted about at will, or even destroyed, as it would seem it was sought to do, by the action of a life tenant whose estate was in a measure antagonistic to their estate. Charity Marshall was not authorized to act for her children in the matter of the partition of the estate of Benjamin Newton; and there is nothing but inference, and no inference even of a positive character,

to show that she ever assumed to act for them. If partition is desired in a case of this kind, the law points out very clearly the course that can be pursued for the purpose. *It does not allow that infants should be deprived of a vested fee simple in remainder in an undivided estate by the action of a life tenant, taking a portion of that estate to herself in fee simple."*

The attention of the court is next invited to the able opinion of Judge Marshall, speaking for the Court of Appeals of Kentucky in *Geddes vs. Western Baptist Theological Institution*, 13 B. Monroe, 530. The will involved in that case was admitted to probate in 1825. It devised a farm to the testator's wife for life. At her death the farm was to be sold by the executors and the proceeds to be equally divided among testator's four daughters. There was a further provision that if any of the testator's daughters should die before the will was carried into complete effect the child or children of such deceased daughter was or were to take the mother's share.

In 1835 the widow and four daughters sold and conveyed the farm to one Going. One of the daughters—a Mrs. Rich—took mortgage security on part of the devised land for part of the purchase money.

In 1846 the husband of Mrs. Rich, who had died, filed a bill against a purchaser under Going for the enforcement of the mortgage. The purchaser defended on the ground (among others) that the children of Mrs. Rich were entitled to the unpaid purchase money.

In the meantime the farm had been subdivided by those claiming under the deed from the widow and the daughters; lots had been sold to numerous persons, and the subdivision had become a part of the city of Covington. It was held that the sale and conveyance by the wife and daughters passed no title as against the children of a daughter who died before the completion of a sale by the executors.

It was admitted by the court that where land is to be sold

and the proceeds paid to certain persons they may elect to take the land. But as to this the court said (p. 545):

"It is contended that this execution of the will carried out the substantial intention and purpose of the testator in favor of his daughters, who were manifestly the primary and principal objects of his affection and benevolence.

"But the right of election, which is the only source to which the potency claimed for these deeds can be attributed, is not itself a paramount and independent right to which all others must succumb. It is but an incidental, subordinate, and derivative right, dependent upon, and growing out of, the principal or original right of taking that which, by the election is given up for something else, which was to have been converted, and, but for the election, would have been converted into the thing which, by the election, is given for it. In the present case, where the legacy given consists of the proceeds of land directed to be sold, the right of election properly and effectually exercised, would be the taking of the land instead of the money to arise from the sale as directed. It would, it is true, dispense with the sale as intended by the will, but it would dispense with it by what would be in substance and effect a purchase of the land by the legatee with the money or legacy intended to have been raised by the sale, and it necessarily involves the right to receive or dispose of that money or legacy which forms the consideration of the purchase. It may be that if the right of the daughters to the proceeds of the sale, when it might be made, had been absolute and indefeasible, the deeds for the land, though executed during the life of their mother, and before a sale could have been made, and before they had any present right of enjoyment, either as to land or money, might have operated, upon the death of their mother, as an election, dispensing with the sale and vesting in their grantee an indefeasible right to the land. The case of *Crabtree vs. Bramble*, cited from 3 Atkyns, 679, and other authorities, giving effect to an election made before the accrual of the right of immediate enjoyment, prove nothing more

than this. *But no case is, or as we suppose can be cited, which decides or tends to prove that an election by a legatee of money directed to be raised by the sale of land, or by a devise of land directed to be purchased with money, can be in itself effectual to convert a contingent right in the subject directly given, into an absolute right in the subject elected to be taken in lieu of it.* And if it be conceded that if Mrs. Rich, as well as her sisters, had lived until after the death of their mother; when a sale might have taken place, they might have dispensed with a sale, and that, by electing to take the land, they would then have carried the will completely into effect, and thus have cut off the ulterior bequest contingent on the death of any of them before the will should be carried into complete effect; and it be further conceded that if they had all lived until a sale might have been made according to the will, their deeds, though previously made, would have been then effectual as an election to take the land, and would then have operated to vest the absolute right in their grantee, by carrying the will completely into effect before the death of any of them; still it is impossible to admit, without utterly disregarding the contingent bequest to the grandchildren, and in effect erasing it from the will, that the death of Mrs. Rich, during the life of her mother, and before a sale could have taken place, and before the will could be carried into effect, did not entirely defeat the operation of her deed, and vest one-fourth part of the legacy, with incidental right of election, in her children. *If it be true, as contended, that a chancellor might on the prayer of the daughters, have sold the land during the continuance of the life estate and subject to it he could not so far have nullified the will as to disregard the contingency to which the interest of the daughters were subject, and if he could have decreed a sale at all before the determination of the contingency, he must have provided for it in making a disposition of the proceeds.* And as he could not free the interest of the daughters from the contingency, by ordering a sale of the land during the continuance of the life estate, no more could they effect that

object themselves by determining that they would take the land when the life estate should be out of the way, or by deeds purporting to sell and convey it and thus to confer upon their grantee the right to enjoy it upon the determination of that estate."

In *Harris vs. Strodl*, 132 N. Y., 392, 397, a testator had devised his estate to his wife for life. If she remarried, the executors were to sell the estate, pay one-third of the proceeds to her and divide the residue among his three sons—the children of any son who may have died to receive the parent's share. On the death of the wife without having remarried, the property was to be equally divided among the three sons—the children of a deceased son to receive their parent's share. Full power to sell was given to the executors "whenever they may deem it best to do so and upon such terms as they may think desirable."

The widow and sons contracted to sell. Their vendee sold to one who refused to accept the title and brought suit to get back his deposit if specific performance could not be decreed. At the trial the defendant produced a deed from the executors conveying the premises to him.

It was held that the widow, the sons and the executors could not convey a good title, because if any of the sons died before the death or remarriage of the widow leaving children those children would take in place of their parent. The court remarked that the deed from the widow and her sons conveyed only a title subject to be defeated in case the above contingency occurred.

And as to the deed from the executors the court said they should have sold so as to secure the proceeds to the grandchildren in the event of the contingency happening making them the ultimate devisees of the testator, and added:

"But as the case is presented, the executors made the conveyance to the defendant so as to enable the takers of the defeasible estates to keep and convert to their own use the full price of the whole estate as

if their children had no contingent future estate in it. The plaintiff has full knowledge of all these facts. What defense could he make to the claim of the grandchildren if, as is not improbable, they become the testator's devisees."

In *Firth vs. Denny*, 2 Allen, 468, there was a bequest of the income of \$9,000 to the wife, with gift over of the principal on her death to various legatees. When she renounced it was held that the \$9,000 must be held by the executors during the widow's life and should then be paid over to the residuary legatees who meanwhile would be entitled to the income.

In *Brandenburg vs. Thorndike*, 139 Mass., 102, a testator left the residue of his property to trustees in trust to pay his wife from the net income a certain sum annually and to add the remainder of the income to the capital. He then provided that at the expiration of three years from the death of his wife the trustees should divide the fund in equal shares among certain "nieces and nephew then surviving" and "the issue of each of said nieces and nephew then deceased leaving issue then surviving according to their right of representation." The widow having renounced, the nephew and nieces claimed that they were entitled to receive their shares at once. In delivering the opinion of the court rejecting this claim, Morton, C. J., said:

"The plaintiffs also contend that, if this be so, the trusts should be decreed to be terminated, and the shares of the nieces and nephew should be paid and transferred to them. Without doubt it is in the power of the court to decree the termination of a trust, and the conveyance of the estate to the parties beneficially interested in it, when all the purposes of the trust have been accomplished and the entire interests under it have all vested in the party seeking the conveyance. *Bowditch vs. Andrew*, 8 Allen, 339; *Inches vs. Hill*, 106 Mass., 575. But this is not such a case. The objects of the trust as created by the testator have not been accomplished,

and all the beneficial interest in the trust fund has not vested in the nieces and nephew now living. The waiver by the widow of the provisions made for her in the will annuls only the provisions of the will in which she has a personal interest. It may diminish the residue of the estate out of which legatees are to be paid, but it does not revoke or affect the bequests to other legatees. All the other provisions of the will are to be carried out as far as practicable. *Firth vs. Denny*, 2 Allen, 468; *Plympton vs. Plympton*, 6 Allen, 178.

"We must construe the bequests in favor of the nieces and nephew in the same manner as if the widow had accepted the provisions of the will. Recurring to this bequest, it is clear that it cannot now be determined who will take under it. It is a bequest to the nieces and nephew 'then surviving' and to the issue of each niece or nephew, 'then deceased leaving issue them surviving.' It cannot be known that any of the nieces and nephew now living will take anything under this bequest. This furnishes a conclusive reason why the trust cannot now be terminated."

In *Hinkley vs. House of Refuge*, 40 Md., 461, the testator gave certain real and personal property in trust for his wife for life. The trustee appointed by the will was directed after the widow's death to pay out of the principal thereof several legacies to charitable institutions and hold the balance in trust as to one-half thereof for the use of all the children of the testator's daughter who might be living at the decease of his wife, and as to the other half thereof, for the use of all the children of the testator's sister who might be living at the same period. The widow having renounced, the real estate was sold by the trustee, and the proceeds were brought into court for distribution. The charitable institutions sought to have their legacies paid at once, upon the theory that, as the widow had renounced all devises and bequests under the will, the time of payment of such legacies to such charitable institutions had been accelerated, and they

were entitled to receive them at once, notwithstanding that by the terms of the will they were payable only on the death of the widow. It does not seem to have been suggested by anybody in this case that the children of the testator's daughter and sister who were living when the widow renounced were entitled to receive anything at that time. And, even as to the charitable institutions, the court held that the legacies to them could not be paid until the death of the widow. In delivering the opinion of the court Alvey, J., after referring to the general rule that a remainder takes effect at once upon the failure of the particular estate, said:

"But while this is the general rule, it is modified under certain circumstances, by the application of the principles of equity, where it is apparent that the event producing the acceleration of the time for vesting the remainder in possession, is not contemplated by the will, and the result produced would contravene the intention of the testator. In this case, it is manifest that it was never contemplated by the testator that the legacies now claimed as payable presently, should be paid before the death of his widow.

* * * * *

"Applying this equitable doctrine, the interest and dividends derived from the remainder of the fund or estate, which was given to the use of the wife for life, will be retained by the trustee, and converted into capital until the death of the widow, her death being the event upon which, according to the terms of the will, the legacies to the appellees are payable."

In *Lowell vs. Charlestown*, 66 N. H., 584, the estate of a testator was devised to trustees who were directed to pay the income of the property to the testator's wife during her life. Then certain legacies were to be paid, and there followed a provision in these words:

"All the rest and residue of my property, both personal and real, in the hands of said trustee or

otherwise not here disposed of at the decease of my wife, I give and bequeath to my native town, the town of Charlestown, in the county of Sullivan, and the State of New Hampshire."

The property devised was to be held by the town for a certain designated charitable purpose. The widow having renounced, the question arose whether the town of Charlestown was entitled to receive immediately the property which was given to it by the above residuary clause. It was held that the town would have to await the death of the widow, the court saying:

"Did the legacies of \$1,000 and \$500 become due and payable to the respective legatees upon the date of the waiver of the will, or upon the death of the testator's widow? The construction of the will is the ascertainment of the testator's intention upon competent evidence. *Kennard vs. Kennard*, 63 N. H., 303. The language of the bequests in this case is plain and unmistakable: 'One thousand dollars of said principal, in the hands of said trustee, immediately on the death of my said wife, I give and bequeath to my oldest brother, Burrill Porter, and order that the same be paid to him immediately on the decease of my wife, to hold to him and his heirs forever.' * * * By the use and natural force of language, the testator could have intended only that these legatees should take and come into the enjoyment of their legacies on the death of the testator's widow. *Hinkley vs. House of Refuge*, 40 Md., 461. The bequests are not those of ordinary remainders after a life tenancy, where by a renunciation by the life tenant the estate in remainder is brought forward and attaches at once to prevent a lapse, there being nothing in the language of the will to show a different intention. *Yenton vs. Roberts*, 28 N. H., 459; *Hall vs. Smith*, 61 N. H., 144. In this case the estate in remainder, after the renunciation of the life estate by the widow, is upheld by a trustee as an executory bequest, and the intention of the testator that these legacies should not be paid until the death of the life tenant is too plain to be mistaken."

In *Sawyer vs. Freeman*, 161 Mass., 543, a testator by his will gave to his executors a sum in trust to pay the income to his widow during her life and upon her death to pay the principal sum and all income thereof then in their hands to her daughter. The will provided that if the daughter should not survive the widow the principal sum and accrued income should be paid to the issue of the daughter if such issue should survive the widow, and there was the further provision that if neither the daughter nor any issue of hers should survive the widow, then the fund should go to a designated residuary legatee. The widow having renounced, the question arose whether the disposition of the fund was accelerated so that it would go at once to the daughter. Holmes, Justice, in delivering the opinion of the court, said:

"Whatever is given to the daughter, Julia Ann B. Lewis, income as well as principal, is given her [meaning, "to her issue"] 'in case said Julia Ann B. Lewis shall not be living at the death of her mother.' Until that time, although her interest is vested, nothing is given to her unconditionally. Income and principal stand on the same footing. Under our decisions at least, we cannot read 'at the death of her mother' as meaning whenever, either at or before the death of her mother, the interest of the latter shall come to an end. *Brandenburg vs. Thorndike*, 139 Mass., 102. Therefore the daughter is not now entitled absolutely to the income by acceleration, assuming that we should apply that doctrine in the case of a gift for life with a remainder over not subject to be divested. *Vance's Estate*, 141 Penn. St., 201, 210. *Yeaton vs. Roberts*, 28 N. H., 459. *Holderby vs. Walker*, 3 Jones Eq., 46. *Macknet vs. Macknet*, 9 C. E. Green, 277."

(Three members of the court dissented in the above case, but only as to the disposition that should be made of the income of the fund during the life of the widow. They held that that income should go towards the reimbursement of

legatees who were disappointed by the action of the widow in renouncing and taking under the law a part of that which was given by the will to such legatees.)

In *Estate of Delaney*, 49 Cal., 76, there was a devise to trustees to sell and invest the proceeds and to pay the income in prescribed shares to the widow during her life and on her death to divide the fund equally among the testator's "surviving children." The widow having renounced and received her proportion of the estate under the law, one of the children applied for immediate distribution. This was refused by the probate court, and its action was affirmed by the Supreme Court of California. On this subject the latter court said (p. 84):

"The will devised to the executor the fee of the lands in question, to be held in trust for the purposes mentioned in the will. The renunciation by the widow of the testator of her right under the will, and the order of the probate court setting off to her a portion of the property as common property, did not extinguish the trusts declared in the will, nor divest the executor of the fee in the remaining portion of the property."

In the *Matter of Lorenz's Estate*, 76 N. Y. Sup., 653—a case in the surrogate court in New York county—it was held that, where a testator devised the remainder after the death of his widow to persons not determinable until that time because of a provision letting in certain issue if then living, the remainders were not accelerated by the election of the widow to claim dower rather than to accept the life estate given her.

The authorities cited by counsel for the appellee on the subject of acceleration, when closely examined, give little support to his claim that the failure of a preceding estate by renunciation of the devisee thereof has the same effect as the

death of the devisee where that would be inconsistent with the scheme of the will.

He quotes from 1 Jarman on Wills (5th Ed.), page 574 [the passage referred to is found on *page 537 of the 6th American edition], the following:

"The doctrine evidently proceeds upon the supposition that, though the ulterior devise is in terms not to take effect in possession until the decease of the prior devisee if tenant for life, or his decease without issue, if tenant in tail, yet that, in point of fact, it is to be read as a limitation of a remainder to take effect in every event which removes the prior estate out of the way."

The remainder of the paragraph in Jarman from which this quotation is made is as follows:

"Such a principle is familiar in its application to the case of an estate for life being determined for forfeiture; and it seems not to be (as commonly supposed) contradicted by *Carriek vs. Errington*, where a man settled the equitable fee simple of lands to the use of T. E. (a papist) for life; remainder to trustees during T. E.'s life, to preserve contingent remainders; remainder to his first and other sons in tail male; remainder to W. E. The limitations in favor of the papist were, in the then state of the law, void; and it was held, that the remainders were not accelerated, *on the special ground, that such a construction would have defeated the limitations to the first and other sons of T. E.* This special ground seems to resolve itself into the common rule, that a contingent remainder in an equitable estate does not fail by the determination of the previous estate, and it then necessarily followed, that the intermediate equitable interest during the life of T. E., being undisposed of, resulted, according to another common rule, to the grantor. It was also argued that W. E. ought to be let in until there was issue of T. E., and then that such issue would be entitled: but Lord King said the court would not 'take upon itself so to direct and displace estates.' 'There is no case,' said Sir J.

Rcmilly, M. R., in *Sidney vs. Wilmer*, 'in which the estate of a remainderman has been accelerated for the purpose of giving him a right to rent accrued before his estate took effect.' "

So, in the case of *Blatchford vs. Newberry*, 99 Ill., 11, 57, 63 (cited on page 54 of appellee's brief), it was claimed that certain remainders were accelerated on the renunciation of the widow, although by the will they were subject to defeasance if the beneficiaries did not survive her and two of the testator's daughters. On that subject the court said:

"The intention of the will, as we find, is, that the time of distribution should be the wife's death, whether she did or did not take this testamentary provision. And this intention is not deduced solely from the words used, that the distribution shall be 'immediately after the decease of my wife,' but it is manifested from other provisions of the will. The intention of the will must govern. No artificial rule of construction can be allowed to prevail over the intention. Surely, if the will had expressed that the wife's death should be the time of distribution, whether she accepted the testamentary provision or not, the rule of acceleration invoked by appellee's counsel would not be suffered to change this fixed time of distribution. The intention of the will that the wife's death should be the time of distribution, whether the testamentary provision was accepted or not, seems to us to be satisfactorily manifested from the provisions of the will, and almost as much so, as if there had been such expression of it as above, in terms. * * *

"The testator might very well prefer, whatever the motive, that his estate should be kept together during the life of the members of his immediate family, and he has most distinctly shown by his words that to have been his purpose, and directed explicitly that the property should not be divided and distributed until after the termination of their three lives."

In *Coltman vs. Moore*, 1 McA., 197, there was no failure of an intermediate estate. An ultimate charitable gift in

remainder was held to be void for uncertainty in the objects of the charity.

In most of the other cases cited on this point by appellee's counsel the devise was to testator's widow for life with a direct and certain remainder over to others on her death, so that acceleration of the remainder was a matter of course, because, as the court said in one of the cases (Cooper's Appeal, 78 Pa. St., 143), "No one was injured thereby." In one of the cases in Pennsylvania relied on by the appellee (Woodburn's Estate, 151 Pa. St., 586) the devise was to the widow for life—on her death to be equally divided among the testator's children. In holding that when the widow renounced the children at once became entitled to the property, the court said:

"No one else is benefited in any way present or future by this provision and there is no other purpose for it discernible in the will or suggested by the testator's circumstances. Even the frequent intent to keep the estate together during the minority of the children is wanting, for the distribution is to take place on the death of the widow without reference to the minority of any of the children."

In all the cases on the subject of acceleration that have been cited by counsel on either side in this case it is believed that the persons claiming the benefit of the doctrine were not beneficially interested in the renounced devise or bequest. Nearly all the cases on this subject grow out of the exercise by widows of their right to take under the law instead of under the will. The controversy in such cases is as to the rights of those who under the will come in after her death or remarriage.

Here, as the facts turned out, we have the case of Eliza T. Berry having a life estate with a devise in remainder after her death to her sisters and their children and other descendants—the interest of the sisters depending upon their surviving her. She and her sisters agree that she shall give

up her life estate for a consideration of one-fifth of the full value of the property, so that they may get the remaining four-fifths, and so cut out their children altogether.

If this be the law contingent remainders or defeasible vested remainders are all at the mercy of those prior in interest. Take the ordinary case of a devise to A for life remainder in fee to B, if he survive A; if not, remainder in fee to C. In such a case could B legally agree with A that A should renounce his life estate and they should then sell the devised property and divide the subject of the gift between them to the exclusion of C?

Stare Decisis, Estoppel, and Laches.

We have no controversy with counsel for the appellee as to the point to which he cites certain decisions on pages 56 to 62 of his brief, under the heading "Rules of Property." If the principles relating to the construction of wills which have been asserted above—and especially the rule relating to the effect to be given to the manifest intention of the testator—are correct, then the authorities which counsel cites are authorities against him. He seems, however, to be unwilling to stand upon those rules himself, because he says on pages 61 and 62 of his brief that

"The affirmance of the decree in the present case can not be used as a precedent in other cases of wills; no settled rule of construction can be violated; no landmark of property be prostrated by it. The question was and is only one of intention, to be gathered from the four corners of the instrument in question; the ascertainment of that intention can affect no other case."

Nor does it seem to counsel for the appellants worth while to discuss in this case the question of estoppel. If the appellants had all been of age when Equity Cause No. 500 was begun, they would not be estopped unless it could be shown

that they in some way consented to the proceeding or received a part of the proceeds of the sales made in that case with knowledge of their source. But to claim that young children or children unborn are estopped to claim their rights in property given directly to them by a testator, because their parents take the property to themselves, is a proposition—to use an expression contained in the opinion of this court in a recent case (*Lenman vs. Jones*)—that may without offense be characterized as “desperate.”

And so of the proposition that the appellants should be enjoined from asserting their claims against the property in question because of laches. Their right of entry of course did not accrue until the death of Eliza Thomas Berry, in May, 1903. By section 1265 of the Code of the District of Columbia, which was in force then and has remained in force ever since, it is provided that

“No action shall be brought for the recovery of land, tenements, or hereditaments after fifteen years from the time the right to maintain such action shall have accrued * * *.”

The present suit was not begun by the appellants, but was filed by Sanders against them. While there is no question that one in possession of real estate has a remedy in equity to have his title quieted against other persons who are putting on the record papers which constitute a cloud on his title, where the claim set up is an unfounded or unjust one, it is somewhat remarkable to find it claimed that an injunction will lie against those who have a good title to the land involved because they have not instituted a proceeding to recover the land at a time when their right to do so is not barred by the Statute of Limitations. The time that elapsed in this case between the death of Eliza Thomas Berry and the beginning of proceedings by the appellants in Equity Cause No. 26,464, referred to in the bill of complaint in this case, was a little over three years.

The reason given in Equity Cause 500 for asking a sale of Metropolis View at that time was that, owing to the occupation of the estate by the army during the war, the place had become dilapidated and was an undesirable place of residence for the daughters. If this was so, it might have afforded a reason for an application to a court of equity to sell the land and to hold the fund so obtained for the uses for which the land was devised. If the children of the daughters then living had been made parties to such a proceeding as that, and the unborn children of the daughters had been properly represented, a decree might have been made giving a good title as against these appellants, who in that case, after the death of Eliza Thomas Berry, would have been entitled to have the fund resulting from the sale divided among them. There was express statutory authority at that time for such a proceeding, by virtue of the act of Congress of August 18, 1856 (11 Stat., 118), the substance of which was incorporated, in 1873, in the Revised Statutes of the District of Columbia, as sections 969 to 973. The last section of the act of 1856 was incorporated in section 973 of the Revised Statutes of the District of Columbia, and reads as follows:

"The proceeds of the sale of such real estate shall be held under the control and subject to the order of the court, and shall be vested, under its order and supervision, upon real and personal security, or in Government securities; and the same shall, to all intents and purposes, be deemed real estate and stand in the place of the real estate from the sale of which such proceeds have arisen, and, as such real estate, be subject to the limitations of the deed or will."

In the case of *Long vs. Long*, 62 Md., 33, which is referred to on page 73 of this brief, the Court of Appeals of Maryland held that the sale which was made in that case under a decree of court for the purpose of having the proceeds of the sale invested in place of the real estate was void

as to grandchildren who were not made parties to it, although such of that class as were in existence when the bill in that case was filed were made parties to the suit.

In this connection it is noteworthy that John A. Middleton, the husband of one of Washington Berry's daughters, in giving his testimony before the auditor in equity cause No. 500, seems to have been under the impression that the sale was to be made for the purposes of reinvestment and not for the purpose of distribution at that time. The following is an extract from his testimony as found on page 23 of the record:

"It would be greatly to the advantage of *the minor heirs* and of all the parties to have the property sold. We think the property will now bring more money than at any future day within the next ten or fifteen years, and a refusal of this application now would, in the opinion of the minor and all the other heirs, result in a large loss to the heirs. And *the capital raised from it by a sale would be much more productive than the real estate itself could possibly be.*"

Conclusion.

It is quite clear that whatever artificial rules of construction may require, Washington Berry's "*dominant*" intention was that his homestead, including the half-acre which embraced the family burying ground and vault, should remain as long as possible with those of his own blood. As to every other piece of property which he disposed of by his will, his language clearly indicates that the devise or bequest was to go into effect at once upon his death or at the latest upon the death of his wife. But as to his home place, including the plot of ground where the bones of his ancestors reposed, he uses altogether different phraseology. He provided that unless all of his daughters should marry, the title to Metropolis View should remain undisposed of until those who should not marry should all be dead, and urged that when-

ever that property should be sold his sons *or some of their sons* would buy it so that it might be "kept in the family" (17).

Realizing, as he must have realized, that if his daughters should all marry and leave the home place to accompany their respective husbands there would be no one left to occupy it, he authorized a sale if that situation should arise, but even then he provides that the proceeds of the sale shall go not to the daughters alone but to them and to their issue.

His wish is expressed with perfect clearness that as long as any daughter of his remained single his married daughters should look to their respective husbands for support and should have no right to interfere in any way with the homestead. He wanted that kept as a sure support for the daughters who should have no husbands. And if the grandchildren had been made parties to Equity Cause No. 500, and the court had directed that the entire interest in the property should be sold and the proceeds held in place of the land, Eliza Thomas Berry would have received all the income until her death, in 1903, and in that way would have been provided for during her long unmarried life. The principal of the fund would have gone as the testator intended it should go, to the children and other descendants of the married daughters *per stirpes*.

As to the four daughters who had husbands when the sale was made in equity cause No. 500, their share of the proceeds became at once the property of their husbands (*Seitz vs. Mitchell*, 94 U. S., 580), a result, which it was the obvious purpose of the testator to avoid.

The unmarried daughter left at most with the income of one-fifth of the property only, finally dies in a public institution (66), and the grandchildren, instead of receiving the property or its proceeds when their maiden aunt passed away, took nothing. Even the sons of the testator, who were enjoined by the will to purchase the homestead, joined with their sisters in asking that the place, family burial ground,

vault and all, should be sold. A more complete departure from the wishes of the testator as indicated in his will would be hard to imagine.

In a case which came to this court from the District of Columbia (*Beyer vs. Le Fevre*, 186 U. S., 114), a will had been set aside in the courts below upon the verdict of a jury in the circuit court, that it had been obtained from the testator by undue influence, and upon a consideration of the evidence which was submitted to the jury the judge before whom the case was tried, the judge holding the equity court which had sent an issue as to the validity of the will to the circuit court to be tried by a jury, and the Court of Appeals, all held that the evidence sustained the verdict. Yet here the judgment was reversed upon the ground that there was no evidence warranting the verdict of the jury. In concluding the opinion of the court in that case, Mr. Justice Brewer said:

“Whatever rule may obtain elsewhere we wish it distinctly understood to be the rule of the Federal courts that the will of a person found to be possessed of sound mind and memory is not to be set aside on evidence tending to show only a possibility or suspicion of undue influence. The expressed intentions of the testator should not be thwarted without clear reason therefor.”

In that case the persons who claimed under the will were adults and were represented by able counsel from the beginning to the end of the litigation, and the will was overthrown in the courts below by the judgment of a jury followed by the judgment of three different courts after hearing all that could be said in favor of the assault on the will.

In the present case the parties whose rights are claimed by adverse counsel to have been destroyed by a proceeding in a court of equity were either young children or they had not yet been born. Nobody spoke for them—the whole case

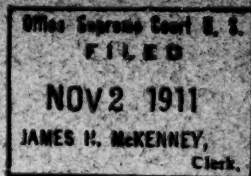
proceeded upon the theory that they had no rights. It should not be permitted that the "intentions of a testator" shall be so "thwarted."

That they have been thwarted so far is plainly evident from this consideration: Let it be supposed that equity cause No. 500 had never been begun; that Eliza Thomas Berry had lived upon the land pursuant to the authority given her by the will of her father until she died, in May, 1903, and that the land had then been sold and the proceeds of the sale were before the court for distribution. Would it be ordered that the money should be paid to the children of the daughters who are appellants here, or would administrators, or administrators *de bonis non*, or administrators *de bonis non, cum testamento annexo* of the other four daughters have to be hunted up or created for the purpose of turning the fund over to them? That does not seem to be a difficult question to answer, but when it is answered the case is decided.

A. S. WORTHINGTON,

Attorney for Appellants.

[14465]



IN THE
Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 40.

ALEXANDER D. JOHNSON ET AL., APPELLANTS,

VS.

THE WASHINGTON LOAN AND TRUST COMPANY,
APPELLEE.

BRIEF FOR APPELLEE.

B. F. LEIGHTON,
Attorney for Appellee.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 40.

ALEXANDER D. JOHNSON ET AL., APPELLANTS,

vs.

THE WASHINGTON LOAN AND TRUST COMPANY,
APPELLEE.

Statement of the Case.

This cause came to this court on appeal from the Court of Appeals of the District of Columbia. The decree from which the appeal is taken affirms a decree in equity of the Supreme Court of the District of Columbia, quieting title to the real estate described in complainant's bill, and enjoining appellants, and the other defendants in the said bill, from prosecuting any suit at law or in equity, concerning the same.

The bill was exhibited against all of the parties to Equity Cause No. 26,464, then pending in the Supreme Court of the District of Columbia, on the ground that the bringing and pendency of said suit cast a cloud upon the title to certain real estate owned by complainant, and described in his bill. While the case was on the calendar of the Supreme Court of the District of Columbia, awaiting a hearing, Henry P. Sanders died. He left a last will and testament by which he devised

the real estate described in said bill unto the Washington Loan and Trust Company, a body corporate, in trust for certain purposes, not necessary to be set out herein, and appointed said company executor of said will. Said testamentary writing was duly admitted to probate and record, and letters testamentary issued to the appellee, who accepted said trust, and entered upon and is now in discharge of the same. Upon petition, said company was made party complainant in place of the said Henry P. Sanders, deceased, and permitted to prosecute said suit.

The complainants in said Equity Cause No. 26,464, the appellants here, are the children of four of the five daughters of Washington Berry, deceased, the construction of whose will is the subject in controversy. The defendants to said cause are the children of the deceased sons of the said Washington Berry; they have not appealed, and the decree of the Supreme Court of the District of Columbia is final as to them.

The facts necessary to a proper understanding of the case are clearly stated in the bill.

The bill avers that the complainant is the owner in fee simple of lots 5, 6, 7, 18 and 19 in a subdivision of a tract of land in the District of Columbia, known as Metropolis View; that said lots were conveyed to complainant by deed bearing date December 15, 1905, from Lydia M. Edmonds, in fee simple; that said lots and parcels of land are parts of a larger tract generally known as Metropolis View, containing about 410 acres of land; that said land was owned by one Washington Berry, and was occupied by him as a home at and for a long time prior to the date of his will; that the said Washington Berry died in 1856, leaving a last will and testament, which bore date July 28, 1852. At the date of testator's will he had five daughters, all of whom were then unmarried, and all of them except one,

Anna Maria, were unmarried at the date of his death. The said Anna Maria had not then born to her any child or children.

Complainant further avers that he derives title to said real estate through numerous mesne conveyances of record, and through certain proceedings and decrees passed by the Supreme Court of the District of Columbia, holding an equity court for said District, wherein John A. Middleton, and Maria, his wife, Allen L. Berry, and Amelia O., his wife, Alexander D. Johnson, and Mary E., his wife, were complainants, and Eliza Thomas Berry, John H. Berry and Rosalie Eugenia, his wife, Washington L. Berry, and Adelaide, his wife, Richard A. Berry, and Elizabeth, his wife, and Thomas W. Berry were defendants. Said cause is known as Equity Cause No. 500 and was filed on the 28th day of August, 1865. All of decedent's children were parties to said cause, either as complainants or as defendants. Testator's widow had died before the filing of said bill.

It was averred in said bill that by the last will and testament of decedent, he devised to his widow for life a certain estate in the county of Washington, District of Columbia, known as Metropolis View, containing about 410 acres of land, and being the homestead of said testator, and provided that said estate should be kept and reserved as the home and residence of said daughters so long as they should remain single and unmarried, and after the death of his widow said testator devised the said estate to his daughters being single and unmarried, and on the death or marriage of the last of them directed that said estate should be sold by his executors and the proceeds of sale distributed by said executors among his daughters living *at his death* and their children and descendants *per stirpes*. He appointed his widow, Eliza Thomas Berry, and his son, Washington L. Berry, the

executors thereof. A copy of testator's will was annexed to said bill and made a part thereof.

Testator's wife, Eliza Thomas Berry, survived him and assumed the office of executrix of said will. Testator's son, Washington L. Berry, declined to assume said office. Said bill averred further that all of testator's daughters, except the defendant, Eliza Thomas Berry, were married, and that all except the defendant, Rosalie Eugenia, had attained the age of majority. That the said estate of Metropolis View was not capable of advantageous partition among the said daughters to whom the same was devised, and that if so capable, partition thereof could not be had owing to the non-age of the defendant, Rosalie Eugenia; and that it was to the interest and advantage of all the parties, including that of the infant, that a sale of said real estate should be made; that the defendant, Eliza Thomas Berry, the only one of said devisees unmarried, was willing to relinquish her right to possession and enjoyment of said estate whilst unmarried, and to assent to a sale thereof and an equal division of the proceeds of sale, irrespective of her right of possession and enjoyment; that during the late war the said estate had been mainly in the occupation of soldiers, by whom much injury had been done thereto; that the rents and profits thereof had not been sufficient to pay taxes and make repairs; that the vault referred to in said will had been by soldiers dilapidated and destroyed, so that it was necessary to remove elsewhere the bodies therein deposited; that all decedent's heirs at law were willing that said burying ground be sold with the residue of said estate.

All of the defendants to said Equity Cause No. 500 duly appeared and answered said bill, consenting to the relief prayed for therein, except the said Rosalie Eugenia Berry, for whom a guardian ad litem was appointed, by whom a formal answer was made for said defendant.

The defendant, Eliza Thomas Berry, in her answer stated that she was willing to relinquish, and thereby did relinquish upon the sale of the estate in the bill mentioned, her right to the possession and enjoyment thereof whilst unmarried, and consented to the distribution of proceeds of sale as prayed by said bill.

The case was referred to the auditor of the court, with instructions to take testimony and report the same to the court, and also to report whether the sale of the real estate in the bill mentioned would be to the interest of the infant defendant in said cause. The auditor took the depositions of John A. Middleton, party to the cause, and of Erastus J. Middleton, not interested therein.

The auditor stated in his report that shortly after testator's death, his widow removed with her family to the city, and that she had since died, and that all of the daughters of testator were married, except the defendant, Eliza Thomas Berry, and that she had not resided on said homestead since her mother left it; and that she relinquished right to occupancy in order to *advance* time for division; that the evidence showed that the property was an unfit residence for the unmarried daughter, the land was generally poor and unproductive as a farm, and that the burial place had been demolished; that the buildings and fences had become much out of order and repair, and that it would be to the interest of all the parties to sell the property, and he accordingly reported that he thought it *a fit case for sale*.

On the coming in of said report the court passed a decree directing said property to be sold for the purpose of partition, and appointed John A. Middleton and Thomas W. Berry trustees to make such sale, and authorized said trustees in their discretion to divide said real estate into parcels, and to sell said real estate so divided instead of as a whole, and on the final ratification of such sales and the payment of the purchase

money, to convey to the purchasers in fee simple the property to him, her or them sold.

The trustees, pursuant to the provisions of said decree, subdivided said Metropolis View into lots numbered 1 to 36, inclusive. Said trustees sold all of said lots at public auction, four of them in 1865 and the residue in 1868. The latter sales were confirmed by decree of the court, passed on the 12th day of October of said year, and the trustees authorized to convey said lots to the respective purchasers thereof. The amounts derived from the sales aggregated more than \$100,000. The purchase money derived from said sales, after deducting the proper expenses, was paid to the five daughters of said Washington Berry.

Complainant in this case further states in his bill that between the years 1866 and 1871 deeds to the several purchasers of said lots from the said trustees in Equity Cause No. 500, were duly recorded for all of said lots, except lot No. 12, which was conveyed later. That in the interval of thirty-five years or more between the recording of said deeds and the filing of Equity Cause No. 26,464, the said Metropolis View was divided into hundreds of separate parcels, or holdings, with hundreds of different owners, and is now so held. That during said interval titles based upon said Equity Cause No. 500 have been passed and approved without a question of doubt by all lawyers and title companies engaged in examining and passing titles, and that the title to the parcels of land conveyed to him, as hereinbefore stated, was sold to Walter D. Davidge, Esq., through whom, by mesne conveyances, he derived title to said real estate; that he and those under whom he claims have for thirty-five years or more been in the exclusive and continuous possession and control of said property, and have during that time paid all taxes and assessments, relying upon the validity of

their title acquired bona fide for a valuable consideration, without notice or suspicion of the adverse or hostile claim now set up in the aforesaid Equity Cause No. 26,464, or any other adverse claim.

Complainant further avers that on the 1st day of August, 1906, the first fourteen of said defendants exhibited their bill of complaint in this court, known as Equity Cause No. 26,464, against the other defendants named herein. Said bill avers in substance, among other things, the death of the said Washington Berry, the grandfather of the parties to said cause, and that he was seized and possessed of the tract of land known as Metropolis View; that the said decedent left him surviving three sons and five daughters, who are named in said will; that he died testate both as to real and personal property. Said bill sets out in full the fifth item of testator's will, and avers that the testator's wife, Eliza T. Berry, survived him, and died in 1864; that all of his daughters married except Eliza Thomas Berry, who never married, and died in the month of May in the year 1903. Said bill then sets out in detail the relationship of the parties to said cause to the said Washington Berry, and how it is derived, showing that the complainants in said cause are the children of the daughters other than Eliza Thomas Berry, of said Washington Berry.

It further avers that said testator by his will appointed his wife and his son, Washington L. Berry, executors of said will and trustees of his estate; that the said Washington L. Berry declined to act as the executor of said will, and that said Washington L. Berry, deceased, survived the said Eliza T. Berry; that if the legal title to said property was vested in either the decedent, Eliza T. Berry, or the decedent, Washington L. Berry, said title is now vested in the parties to said cause, or some of them.

Said bill further avers that under the terms of the

will of said Washington Berry, upon the death of Eliza T. Berry, the daughter of said Washington Berry, the entire equitable interest in said real estate vested in fee simple in the complainants to said bill; that in the case of John A. Middleton et al. *rs.* Eliza T. Berry et al., being Equity Cause No. 500, John A. Middleton and another were appointed to sell said land, and, through deeds executed by them, said land was attempted to be sold and conveyed to various persons, and all of said land is now held by persons claiming *adversely to complainants*; that when said bill was filed and said sales made by said trustees, the complainants, Alexander D. Johnson, Eliza Thomas Berry, John Henry Berry, Leila T. Berry, Albert L. Berry, and John A. Middleton were in existence. They were all minors, and that none of them were made parties to said suit or in anywise represented therein. Complainants aver that their rights and interests in said lands were not affected by the proceedings in said cause, or by the sales made by said trustees therein. Said bill in Equity Cause No. 26,464, contained the usual prayers for process and general relief, and that a trustee or trustees might be appointed in the place and stead of Eliza T. Berry and Washington L. Berry, named in the will of said Washington Berry, deceased, as trustees thereunder, and that the legal title vested in the parties to said last-mentioned suit, or any of them, in said real estate be transferred to such trustee or trustees to be appointed by decree of this court.

On the 20th day of February, 1907, a decree was passed in said Cause No. 26,464, appointing the defendants, Thomas W. B. Middleton and Eugene Benton Berry, trustees under the last will and testament of Washington Berry, in the place and stead of Eliza T. Berry and Washington L. Berry, trustees of the last will and testament of the said Washington Berry, deceased.

Complainant in pending Equity Cause No. 27,071, fur-

ther avers that since the passing of said decree in Equity Cause 26,464, no further proceedings have been taken in said cause by said trustees, nor have said trustees in any manner sought to enforce any claim or demand they may have or claim to have against complainant by virtue of said will and of said decree.

He further says that by virtue of the will of said Washington Berry, and the proper interpretation thereof, and the interpretation thereof in said Equity Cause No. 500, and by virtue of the proceedings had and taken in said Equity Cause No. 500, a good and indefeasible title in fee simple to said real estate, conveyed to complainant as aforesaid, passed to and became vested in the purchaser from the trustees John A. Middleton and Thomas W. Berry, and that said title passed by mesne conveyances, and is now vested in this complainant; and that this complainant has *also* acquired, and now has an indefeasible title to said real estate by adverse possession, and that he, and those under whom he claims, have been in actual, open, notorious and adverse possession, without any interruption whatever, of all the real estate described in the conveyance to him as aforesaid, and as set out in said bill, for more than twenty years, to wit, for a period of over thirty-five years; that no question, claim or demand has ever been made upon him or those under whom he claims in regard to his title to said real estate so derived under Equity Cause No. 500, as aforesaid, and until the said suit No. 26,464 was brought by the said defendants hereto numbered 1 to 14 against the defendants hereto numbered 15 to 24, as aforesaid, such claim, if it existed, was unknown to complainant; that the pendency of said cause, No. 26,464, and the claim made therein, and the averments contained in the bill in said cause, constitute and create a cloud upon complainant's title and a menace of future litigation of such a public and notorious character that, although the same

does not create a *lis pendens* as to complainant, it effectually prevents him from disposing of his property either by sale or by encumbrance, and prevents examiners of title from passing his title without mention of said pending cause; that the construction given by this court in the aforesaid Equity Cause No. 500, as to the effect of the said will of Washington Berry to vest in his daughters living at his death, the absolute interest in the proceeds of sale and the right to have advanced the time of sale and distribution, the prior purposes and trusts having been accomplished, and the construction given to wills containing similar provisions by this court in special and general term, by the Court of Appeals of the District of Columbia, and by the Supreme Court of the United States, in cases arising in and affecting lands situate in the District of Columbia, establish beyond question the validity of the titles derived through the aforesaid Equity Cause No. 500.

Complainant prays that his title in and to the real estate described in said bill of complaint may be declared to be perfect and that the defendants may be perpetually enjoined from asserting any title by sale or otherwise, or making any claim or demand to or against said real estate or any part thereof, and the bill also contains a prayer for general relief.

The subpoena having been returned "Not to be Found" as to defendants 15 to 24, both inclusive, a decree pro confesso was taken as to them on the 8th day of July, 1907, after due publication.

This decree is made absolute by the decree from which the appeal is taken.

The defendants 1 to 14, both inclusive, filed an answer to said bill, in which they deny that the title to the real estate in said bill described is vested in the complainant in fee simple. On the contrary they aver that said defendants are the legal and equitable owners in fee of all

of said real estate, and that if the complainant has any interest at all therein, which they do not admit, it is a naked legal title.

Defendants set up in their answer their respective parentage and the dates of their birth. They aver further that at the date of the filing of the bill of complaint in Equity Cause No. 500, the defendants John A. Middleton, Leila Thomas Berry, and Albert L. Berry were living, and that since none of said defendants, who were born before said equity proceeding was instituted, were made parties thereto, or were in anywise represented by proceedings in said cause, the decree passed therein, and the sale made in pursuance thereof, has no effect against them.

Defendants deny upon information and belief that since the lots were sold under the subdivision in Equity Case No. 500, the titles have been passed and approved without question by all lawyers and title companies engaged in the examining and the passing of titles.

Defendants aver that by the proper interpretation of the will of Washington Berry, they are the legal or equitable owners in fee of the real estate described in the third paragraph of complainant's bill, which complainant claims to own, and that the proceedings in said Equity Cause No. 500, and the conveyances made by the trustees in said cause, did not, and do not, in anywise affect the title and ownership of the said defendants in said land. While admitting the possession held by complainant, as averred in the seventh paragraph of his bill, to be true, as therein stated, defendants claim that such possession was not in fact adverse as to them until May, 1903, because, while they had a legal or equitable interest in fee to said lands, they had no right of entry into said real estate until May, 1903, when said Eliza T. Berry, the last survivor of said five daughters of said Washington Berry died, never having been married.

Defendants deny that the daughters of Washington Berry, or any of them, had the right to have advanced the time for selling and distributing the proceeds under the terms of the will of Washington Berry.

All the other averments of complainant's bill are admitted.

The complainants in the case took the evidence of witnesses connected with the real estate title insurance companies of the District of Columbia and others, whose uncontradicted evidence shows beyond question that all title examiners who have had occasion to pass on titles to land carved out of Metropolis View, and coming through the will of Washington Berry in Equity Cause No. 500, have uniformly considered said titles to be valid, and have so reported and advised purchasers and mortgagees, or persons loaning money on such property as security.

The only other evidence in the case was that of the defendants, who took some evidence showing the dates of the marriages and deaths of Washington Berry's daughters and the dates of birth of their respective children, and also evidence which showed that Eliza T. Berry, the only unmarried daughter, died in 1903.

The questions presented by the record are:

First. Does Equity Cause No. 26,464 constitute a cloud upon the title to the real estate described in complainant's bill?

Second. Did the daughters of Washington Berry take a vested, or a contingent, remainder in Metropolis View, under his will?

Third. Did the court, in Equity Cause No. 500, have jurisdiction to accelerate the time of sale fixed by Washington Berry, in his will, and to decree a sale of the property?

Fourth. Does the interpretation placed upon the fifth

paragraph of said will, in Equity Cause No. 500, and the interpretation given thereto by the bar of the District of Columbia, since the decree passed in said cause, create or constitute a rule of property?

Fifth. Can the children of the married daughters of Washington Berry maintain this suit, or are they estopped by reason of the proceedings and sale in Equity Cause No. 500?

Of these in their order:

I.

Cloud on Title.

In the case of Peirsoll *vs.* Elliott, 6 Pet., 95, the complainant sued as the heir at law of Sarah E. Elliott to remove a cloud from the title of certain real estate which she attempted to deed away in her lifetime. She was a married woman at the time the deed was made, and while her husband joined in the deed, the certificate of acknowledgment was defective, in that it contained no separate acknowledgment by the wife. This defect rendered the deed void. In deciding the case Justice Marshall said:

"The court is well satisfied that this would be a proper case for a decree, according to the prayer of the bill, *if the defectiveness of the conveyance was not apparent on its face, but was to be proved by extrinsic testimony.*"

The court held that the decree below dismissing the bill ought to be so modified as to express the principles on which the bill was dismissed.

In the case of Ward *vs.* Chamberlain, 2 Black, 430, the court held that where an execution had been levied upon real estate, a bill in equity would lie in aid of the execution, to remove and ascertain doubtful encumbrances

which are impediments to a fair sale of the land. Justice Clifford, in deciding the case, said:

“Equity will not allow a title to real estate otherwise clear to be clouded by a claim which can not be enforced at law or in equity, and consequently will interfere in behalf of the holder of the legal title to remove a cloud on the same.”

Under an act of Congress dated July 23, 1866, Congress granted, subject to certain exceptions, odd numbers or alternate sections of public lands to the use of the St. Joseph and Denver City R. R. Co., within a prescribed distance on each side of the proposed road. The company duly filed in the office of the Secretary of the Interior a map showing the definite location of the line of the road. The appellant, subsequent to the filing of the plat, entered a portion of the land covered by the grant to the railroad and received a patent from the United States therefor. The defendant had succeeded to the rights of the railroad company in respect to the land in controversy and exhibited his bill in equity in the court below against the appellant to have said patent cancelled and the cloud cast on his title removed. The court, held, first, that on filing of the plat locating the road by the company, the right to the sections of land vested in the company; second, that no valid adverse title to any part of said land could be acquired by subsequent settlement or entry; third, that the patent created a cloud upon defendant's title which equity had power to remove. Justice Field, in speaking for the court, said:

“It follows from what we have said, that when the defendant made his entry of the lands in controversy and obtained a patent therefor, the title had passed from the United States, and consequently no right could be conferred upon him. Still, the patent gave color of title, and because

of its issue the officers of the Land Department have refused to give a patent to the company embracing the lands, holding, as may be inferred, the view for which the defendant contends, that his right to enter them continued until notice of the order of the Secretary directing their withdrawal from market was received by the local land officers. The existence of the patent, therefore, embarrasses the assertion of the complainant's rights; that is, it prevents him from obtaining a strictly legal title which would enable him to recover possession of the premises by an action at law. The existence of the patent also creates a cloud upon the title of the land. Every instrument purporting by its terms to convey land from the original source of title, however invalid, creates a cloud upon the title if it requires extrinsic evidence to show its invalidity."

Van Wyck vs. Knevals, 106 U. S., 360, 370.

The case of *Alexander et al. vs. Pendleton*, 8 Cranch, 462, was a bill filed by plaintiff for the purpose of quieting the title to certain property situate near the city of Alexandria, Va. Chief Justice Marshall, in disposing of the case, said:

"The situation of the land adjoining a growing city, the number of persons who are consequently interested in the settlement of the country, and the numerous titles which depend upon it, give it peculiar claims to the attention of the court."

The case of *Holland vs. Challen*, 110 U. S., 15, was a suit in equity to quiet the title of plaintiff to certain real estate situated in Nebraska against the defendant, who claimed an adverse estate in the premises. Justice Field, in discussing the case, said:

"No adequate relief to the owners of real property against the adverse claims of parties not in possession can be given by a court of law. If

the holders of such claims do not seek to enforce them, the party in possession, or entitled to the possession—the actual owner of the fee—is helpless in the matter, unless he can resort to a court of equity.”

The court held in that case that the jurisdiction of an equity court to relieve owners of real property from vexatious claims to it casting a cloud upon their title, is inherent in a court of equity.

Relief may be given in a court of equity to prevent a cloud from being cast upon complainant's title, as well as to remove such cloud.

Carroll vs. Safford, 3 How., 441.

Brown vs. Chase, 94 U. S., 812.

Allen vs. Hanks, 136 U. S., 300.

Sharon vs. Tucker, 144 U. S., 533-547.

Where tax deeds appear, on their face, to be clouds upon plaintiff's title, a bill in equity is the proper form of obtaining relief.

Gage vs. Kaufman, 143 U. S., 471.

Rich vs. Braxton, 158 U. S., 375.

Pomeroy in his work on Equity Jurisprudence, in discussing the subject under consideration, says:

“It is impossible to lay down rules which would cover all the cases in which a court of equity will interpose its jurisdiction to remove a cloud upon the title to real estate. This jurisdiction does not rest upon any arbitrary rules, but depends upon the facts of each case. Instruments and proceedings of every conceivable nature have been removed as clouds on title.”

These observations are supported by a large number of cases.

See Vol. VI, Pomeroy's Equity Juris., sec. 727.

The filing and pendency of Equity Cause No. 26,464 is within the condemnation of the principles established by these authorities. It contained the usual prayers for process and general relief and a specific prayer that trustees be appointed under the will of Washington Berry, and that the title of all the parties to said cause be vested in the trustees when appointed. Trustees were appointed pursuant to this prayer. The prayer was based on the assumption that some or all of said parties had title to Metropolis View; that no title was conveyed thereto by conveyances based upon the decree in Equity Cause No. 500. It is equivalent to a direct assault upon the titles held under conveyances authorized and confirmed by the solemn decree of the court in that case. It could have had but one of two purposes: either that the trustees, when appointed, should proceed to sell the property under the powers contained in the will of Washington Berry, to be followed by the purchasers with a suit in ejectment for possession, or by an appeal to equity by the trustees in enforcement of their claim, or else that the trustees should remain inactive and compel every person dealing with the title to said property to procure a quit-claim from said trustees at such price as they might see fit to exact. Is it not apparent that by the filing of Equity Cause No. 26,464 a cloud of such portentous and threatening aspect was cast upon the title of all of the tract of 410 acres, embraced in Metropolis View, as to injuriously, and in some instances disastrously, affect the right of all persons having any interest therein? Upon its being filed building ceased; sales, except under the bell and flag, were not possible, unless at ruinous prices; the property could not be pledged for debts or loans to meet the necessities or convenience of the owners. It is submitted that such a serious curtailment of the rights of the owner in the

enjoyment of his property constitutes a cloud which equity will remove.

This position is not controverted by the appellants.

II.

The Remainders were Vested.

The daughters of Washington Berry took under his will a life estate in Metropolis View to take effect in possession upon the death or determination of the life estate of their mother, Eliza T. Berry, therein, to terminate on their marriage; and also at *death of testator* a *vested remainder* in severalty in fee, to take effect in possession on the marriage of all of them, or the death of the last unmarried daughter.

A study of the will in controversy will show that this statement correctly expresses the legal effect of said instrument, and the true purpose and intention of the testator.

The testator divides his children into separate groups in accordance with their sex. To his three sons he gives three farms or plantations of about equal size, and presumably of approximately the same value, in fee simple. The devises to his sons, Washington L. and Zachariah, are conditioned upon their executing deeds conveying their interest in certain property, in fee, to his daughters, *share and share alike*. On their failure to execute and deliver said deeds for a period of two years after testator's death, then the property devised to his said sons was to go to his daughters *living at his death, share and share alike*. He attempted to qualify the devises to his said sons by a provision that if either of said sons should die without lawful issue, then the estate of each one, or both, if more than one, should go to the survivor or survivors, in fee simple, his or their heirs and assigns.

This condition is invalid, in that it is inconsistent with the estate in fee previously devised. *Howard vs. Carusi*, 109 U. S., 729. But it shows, nevertheless, the general purpose of the testator in the division of his property to treat his sons as one group or class of beneficiaries and his daughters as another, and as he excluded his daughters and their descendants from any participation, in any event in the property devised to his sons, so he intended to exclude his sons and their descendants from any participation, under any circumstances, in the property devised to his daughters.

By the fourth section of his will he devised to his wife for her life, in the event she survives him, Metropolis View, the homestead, where he then resided, and certain personal property. The personal property was to be held in trust by his wife for the proper and comfortable maintenance of testator's five daughters, whom he named, so long as they and each of them remained single and unmarried, and on the marriage and birth of issue of each of them, then to deliver to the one so married and having issue her just and full part of said personal estate.

In the fifth item of his will he declares it to be his will and desire that his said homestead should be kept and continued as the home and residence of his daughters, so long as they shall remain single and unmarried, and provides as follows:

"I therefore, first, after the death of my wife, will and devise the said estate to my said daughters, being single and unmarried, and to the survivor and survivors of them so long as they shall be and remain single and unmarried, and on the death or marriage of the last of them then I direct that the said estate shall be sold by my executors and the proceeds thereof be distributed by my said executors among my daughters *living at my death*, and their children and their descendants

(*per stirpes*), and I hereby reserve to my heirs, the family vault and burial ground, embracing half an acre of ground, and having the said vault as a center and on such sale as aforesaid, by my executors, I earnestly enjoin on my sons or some of my sons or some of their sons, to purchase the said homestead that it may be kept in the family."

The testator clearly and expressly indicates by the phrase "*living at my death*," that his death was the period fixed for the vesting of the rights of the parties, and the phrase "*per stirpes*" indicates beyond question that the "children and descendants" should take only through the parents, so that whether the words "and their children and their descendants" be deemed words of limitation or of substitution, it seems plain *that the period of his death was in the mind of the testator as the time for vesting in right*, and on either construction the daughters took absolutely vested rights. Placing the phrase "*living at my death*" after the word "descendants" the whole phrase would then read "*among my daughters and their children and their descendants living at my death per stirpes*," and the words "and their children and their descendants" become words of substitution, but limited to take effect in vesting or in right at the death of the testator. Such transposition is allowable (*MacArthur vs. Scott*, 113 U. S. Rep., bottom of page 376), and is justified by the text as well as the context of the will in question.

In the following, or residuary paragraph (item sixth) of the will, testator provides for distribution of his residuary personal estate among "*my children, living at my death, and the descendants of such as have died during my life, to take a parent's part*."

This sixth clause indicates that the testator supposed he had disposed of all of his interest in real estate, and

he makes no mention of it in writing the residuary clause of his will.

The direction for a sale of the property and a division of the proceeds among his daughters living at his death was equivalent to a limitation of the title in fee to them, and they could have elected, on testator's death, to take the property instead of the proceeds to be derived from its sale.

6

Poor *vs.* Considine, [^]Wall., 472.

Cropley *vs.* Cooper, 19 Wall., 167.

Hauptman *vs.* Carpenter, 16 Court of Appeals (D. C.), 524.

His secondary purpose was that they, with their mother, so long as she lived, should use and enjoy Metropolis View as a home, so long as one of them remained unmarried. He did not intend that the marriage of his daughters should, *ipso facto*, work a forfeiture of all their interest in and right to the property, but such would have been the result attending the marriage of his daughters, unless the interest in remainder acquired by them under the will was vested. If it was contingent, then, pending the contingency upon which it was to vest, to wit, the marriage of all of testator's daughters, or the death of the last unmarried daughter, the inheritance under the English common law would have been in abeyance, and under the modern decisions, would have descended to testator's heirs at law.

Fearne on Contingent Remainders, p. 351, and cases there cited.

All the heirs of Washington Berry were parties to the suit in partition, Equity No. 500. If the legal title was vested in them, it must have been passed by the sale made by the trustees to the purchasers and be now held

by those who succeeded to the title of the original purchasers.

According to the contention of the appellants, if one or more of testator's daughters had married and died between the date of said will and the death of testator, *leaving lawful issue her or them surviving and living at the time of his death*, such issue would have taken no interest under testator's will, a construction not to be given unless the language of the will imperatively compels it.

232

Goodlittle *vs.* Whitby, 1st Burrows, [REDACTED].

This case was cited and relied upon in the case of Poor *vs.* Considine, *supra*. In discussing a similar contingency in the matter of the will of William Cooper, in the case of Croyley *vs.* Cooper, *supra*, a case going up from the District of Columbia, Justice Swayne said:

"It is a consideration of weight that if William Cooper Croyley, who died at the age of twenty-eight, had married and left children, according to the proposition of the appellees, they could have taken no benefit from the provision made for their father. Such could not have been the intention of the testator. *In real property cases where the question arises whether a remainder is vested or contingent, this consequence is held to be conclusive—that it was the former*" (p. 175).

The legal presumption arising from the making of the will itself is, that the testator intended to dispose of all of his property, and not die intestate as to any of it. This presumption must prevail unless overborne by the terms of the will itself.

Given *vs.* Hilton, 95 U. S., 591.

In the case of *Snyder vs. Baker*, 5 Mackey, 455, the court says:

"It is a recognized principle that when a man has undertaken to make a will, it is presumed that his purpose was to dispose of his entire estate."

Testator's vision did not extend beyond the time of his death. No purpose is manifested in any part of his will to tie up his property for the benefit of his grandchildren or remote posterity. As was said by Justice Gray, in speaking for the court in *Barber vs. Pittsburgh*, etc., Railway:

"The first taker is always the favorite object of testator's bounty, and, as such, entitled to every implication."

166 U. S., 100.

This is especially true in respect to the devise to his daughters. The proceeds of the sale of Metropolis View are to be divided among his daughters *living at his death*. He uses the same phrase in the limitation over to them of the property given to his sons, Washington L. and Zachariah Berry. They were the objects of his chief concern. The children or descendants of a daughter were to take in substitution and place of such daughters as should die before him, and not independently of them.

That effect must be given to a general intent, although to do so may render ineffective some particular intent, is well established by the authorities.

Inglis vs. Sailors' Snug Harbor of N. Y., 3 Pet., 118.

Sheriff vs. Brown, 5 Mack., 172.

The use of the words "per stirpes" confirms this view. The will was written by the testator himself. Its language shows that he had some knowledge of the law. He uses technical language in several places in his will.

There is nothing to indicate that he used the words in any other than their ordinary sense.

Taking "per stirpes" is taking by descent, and is the only mode of succession known to the common law.

2 Blackstone's Commentaries, chap. 32, p. 517.

The meaning of the term "per stirpes" is formulated in the fourth canon of descents, and is thus expressed:

"Lineal descendants in infinitum, of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living."

Blackstone's Commentaries, Book II, p. 217.

This rule can have no application except to estates of inheritance. If the words "per stirpes," as used by the testator, are to have their usual significance, *the daughters living at testator's death* must necessarily have taken such an estate.

Where the distribution is to be "per stirpes," the principle of representation will be applied to all degrees; children never take concurrently with their parents.

Jarman on Wills, Vol. II (5th Ed.), marginal page 100.

By the use of the words "children and descendants," testator intended to provide against the contingency of the death of one or more of his daughters leaving issue at the time his will became effective at his death. If these words were not used as words of substitution, they were used as words of limitation, and the daughters took a fee tail estate, which is the legal equivalent in this jurisdiction of an estate in fee simple.

Dengel vs. Brown, 1 App. D. C., 423.

It makes no difference in result, whether the daughters took a fee or fee tail general. In either case, appellants

would derive title by or through them, and not as purchasers under the will. If, after the making of the will, either of testator's daughters had died before him, leaving children or descendants, such children or descendants would have taken by purchase, the deceased daughter's share; if the death of the daughter had taken place after that of the testator, her children or descendants would take by inheritance.

The birth of the first grandchild occurred *after the death of Washington Berry* (Rec., pp. 22 and 40). This brought the case clearly within the rule of construction laid down in Wild's case:

"The rule of construction commonly referred to as the doctrine of Wild's case is this, that where lands are devised to a person and his children, and he has no child at the time of the devise, the parent takes an estate tail; for it is said 'the intent of the devisor is manifest and certain that the children (or issues) should take, and as immediate devisees they can not take, because they are not in rerum natura, and by way of remainder they can not take, for that was not his (the devisor's) intent, for the gift is immediate; therefore such words shall be taken as words of limitation.'"

Jarman on Wills, Vol. III (5th Am. Ed.), pp. 174-182.

The authority of the rule announced in this case has been generally recognized by the courts of the United States in cases coming within its scope.

A bequest to A and his children when A has no children, either at the time the will is made or when it takes effect at the testator's death, vests the absolute property in A. This was so held in the case of *Van Zant et al. vs. Morris*, 25 Ala., 292. The court said:

"There can be no doubt that a testator by his will can limit property, whether real or personal, to one and his children then unborn; but a bequest

to A and his children, if A has no children, either at the time the will was made, or when it takes effect by the death of the testator, never has been held to create an interest in after-born children as *purchasers*. The term 'children' in such case is a word of limitation and not of purchase."

The binding force of the rule is recognized in the following cases:

Akers *vs.* Akers, 23 N. J. Eq. (8 Green), 26.

Nightingale *vs.* Burrell, 15 Pick., 104.

Moore *vs.* Leach, 5 Jones' Law (N. C.), 88.

Jones' Executor *vs.* Jones, 13 N. J. Eq., 236.

In discussing the rule in the case of Johnson *vs.* Johnson, McMullan's Equity (S. C.), 345, 347, the court said:

"As is said in Wild's case, 6 Cok., 16, which has been followed as familiar law ever since, that if lands are devised to A and his children, who has children living at the time, they will take as joint tenants or tenants in common, but if it be to A and his issue or children, and he have no children, he will take an estate tail. There is a design to benefit the children, but they can not take as immediate devisees, not being in *rerum natura*, nor by way of remainder, the devise being immediate."

The rule came before the same court again in the case of Reader *vs.* Spearman, 5 Richardson (S. C.), 88, 91, 94. Chancellor Dargan said:

"The principles resolved in that case have been received for law from that day to this in England, and are confessedly the law of South Carolina."

The court held that the case of Johnson *vs.* Johnson not only did not question the authority of Wild's case, but that that case furnished the authoritative rule by which Johnson *vs.* Johnson was decided.

In the case of *Chrystie vs. Phyfe*, 19 N. Y., 345, 354, the court, citing Wild's case, said:

"There was a class of cases, and one only, in which the term 'children' is considered as a word of limitation; that is, where there is a present devise to one and his children when he has no children at the time. Then, if the word children should be interpreted as a word of purchase, future children would not take at all; and in order that the will of the testator may operate favorably to them, and not continue the gift to the parent for life, 'children' is then deemed a word of limitation."

In the case of *Hamlin vs. Osgood*, 1 Redf., 411, the court held that the word "descendants" means what the word obviously imports, the issue of the body of the person named, of every degree, as children, grandchildren and great-grandchildren.

In the case of *Torrance vs. Torrance*, 4 Md., 11, the court held that the word "descendants" in the phrase "dying without leaving any child or children, or descendants of such child or children" was equivalent to the word "issue."

A descendant is one who proceeds from the body of another, however remotely. The word is coextensive with issue, but does not embrace others not of issue.

Estes vs. Gillett, 132 Ill., 287, 297.

Tichnor vs. Brewer's Exr's, 98 Ky., 349.

To the same effect are—

Baker vs. Baker, 8 Gray, 101, 120.

Barstow vs. Goodwin, 2 Bradf., 413-416.

These cases are cited in this connection for the purpose of showing the legal meaning of the words and terms used by the testator in his will. The words "living

at my death" are not ambiguous, and do not need either case or lexicon to define their significance. His thought and purpose was that the property devised by this paragraph of his will, should become vested at his death, and not at some future time. To give this item of his will any other significance, it is necessary to eliminate these words, as well as the words "per stirpes," from the text of the will. That this was his thought and purpose, is reinforced by the use of the same words in the second paragraph of his will, and by the use of the word "living" in the closing sentence of its first item; both of which expressions were used with respect to his daughters; and also by the direction in the sixth paragraph of his will, directing his executors to divide the residue of his personal estate among his children *at his death, the descendants of such as had died, to take a parent's part.*

If the case is read by the light of the authorities, a like result is reached.

The case of Hauptman vs. Carpenter is on all fours with the case at bar. The will of the testator in this case, which was before this court for interpretation, was in the following language:

"I give, devise, and bequeath all my real estate and personal property to my children, Charles W. Hauptman, Mary Ellen Hauptman, Adelia Hauptman, or such of them as shall survive me, for during and until the full end and term of their natural lives, and with this qualification if either of them shall marry, the interests and estates of such so marrying shall cease and terminate with such event and be and become vested in such of them as shall remain unmarried for the term aforesaid.

"2d item. After the death of all my aforesaid named children, or their marriage, I give, devise, and bequeath all of my aforesaid real estate and personal property to my son, Francis E. Haupt-

man, upon the trusts following, to sell the same at public auction or at private sale, as the majority of the parties in interest may elect, and out of the proceeds thereof he shall first pay the costs and expenses thereof; next he shall distribute the residue *among my children, and their respective descendants*, if they, or any of them are dead, in the same proportion that are provided by the law regulating descents in the District of Columbia, excepting throughout my son, George W. Hauptman, and his heirs, who has already received his portion."

Testator had eleven children, including the three life tenants named in the will. One of them, Francis E. Hauptman, died before Charles and Mary, both of whom died unmarried, and devised all his estate whether vested or in possession, to the children of George W. Hauptman, deceased. The court held that Francis E. Hauptman took a vested remainder in the estate of his father under his will. Chief Justice Shepard, in deciding the case, said:

"The determination of the prior estate created by the first clause of the will was not dependent upon the happening of a dubious and uncertain event. It was bound to end with the death of the survivor of the three devisees, though it might be determined sooner by the marriage of all.

"Francis E. Hauptman was one of the children of the testator to whom the remainder was devised. These were certain and definite *persons in esse* at the death of testator, who were clearly vested with the right of immediate possession upon the sudden determination of the particular estate."

Hauptman *vs.* Carpenter, 16. App. D. C., 524.

In deciding this case, the Court of Appeals referred to the similarity of language in the will of Washington

Berry, and that before the court in *Hauptman vs. Carpenter*, supra; and the Chief Justice, speaking for the court, said:

"In that case the will of Daniel Hauptman devised a life estate to three of his numerous children, subject to be defeated by marriage; the interest of one marrying to become vested in the unmarried survivor or survivors. The next paragraph provided that 'after the death of all my aforesaid named children, . . . I give, devise and bequeath all of my aforesaid real estate and personal property to my son Francis E. Hauptman upon the trusts following, to sell,' etc., and distribute the proceeds among testator's children and their respective descendants if they or any of them are dead, etc. The three life tenants died unmarried, one of them only before Francis E. Hauptman, who died leaving no issue. It was held that Francis E. Hauptman took a vested estate which passed under his will. It was said: 'Tested by the definitions heretofore given of vested and contingent remainders, it would seem that the devises made in the will of Daniel Hauptman fully satisfy all the conditions of the former; and we find nothing in the remaining provisions clearly manifesting an intention to create a different estate. . . . That the estate is ordered to be sold, and the proceeds divided after the determination of the life estate, thereby working an equitable conversion of the estate or interests in remainder, is of no importance in determining the character of that remainder.'"

33 App. D. C., 258, 259.

In case of *Poor vs. Considine*, supra, the will of William Barr devised certain real estate, in trust, for his son, John M. Barr, and Maria Barr, his wife, for life. The will contained this clause:

"And upon the decease of the said Maria Barr, wife of the said John M. Barr, *in case she survive*

him; if not, then, upon the decease of the said John M. Barr, I do further give and devise the remainder of my estate in said farm unto the legitimate child or children of the said John M. Barr, and their heirs, forever. . . . But should my said son, John M. Barr, die without leaving any issue of his body, then," over.

At the time of testator's death John M. and Maria Barr had one child, Mary Jane Barr, who died shortly after her father, leaving her mother, who survived her for many years. On one side it was contended that the vesting of any estate in Mary Jane Barr depended upon her surviving her mother; on the other, that her interest was that of a vested remainder. The court held that she took a vested remainder, in fee simple, subject to open and let in after-born children, and liable to be divested by their dying before their father, but not liable to be defeated by any other event (p. 473).

The case of *Cropley vs. Cooper*, supra, is much in point. It went to the Supreme Court on appeal from this District. William Cooper died testate, leaving a widow and three sons and one daughter; two of the sons were married and had children; the other son was unmarried; the daughter was married to one Richard Cropley and had one son, William Cooper Cropley. Shortly after testator's death the daughter had another child, who died in infancy. William Cooper Cropley, who was living at testator's death, died at the age of 28 years, without issue, leaving his mother surviving as his personal representative. Mrs. Cropley survived her husband, her mother, and her son. Testator had five pieces of property. To his unmarried son, John, at his mother's death, he left the usufruct of a farm for life. Should he marry and have legal issue, the farm, or if previously sold, the avails thereof, together with any interest that may be

due at his decease, to be divided equally among his children on their arriving at the age of 21 years.

Then follows this clause:

"Should my said son John die without lawful issue, it is my will that the said farm, or its avails, in case of its being sold, be equally divided between my other children, share and share alike, to them, their heirs and assigns forever."

To his daughter, Elizabeth Cropley, at her mother's death, he gave the rent of a house in the city of Washington, for and during her life, and, at her death, directed that the said property be sold and the avails thereof become the property of her children or child, when he, she, or they should have arrived at the age of 21 years. The interest, in the meanwhile, to be applied to their maintenance. The question in the case was as to whether the interest of William Cooper Cropley, under this clause of the will, was a vested or contingent remainder. The court held that the remainder was vested. Chief Justice Swayne, speaking for the court, said:

"A devise of lands to be sold after the termination of a life estate given by the will, the proceeds to be distributed thereafter to certain persons is a bequest to those persons, and vests at the death of the testator" (p. 175).

In the case of *Myers vs. Adley*, 6 Mackey, 515, the will of Charles Myers contained the following clause:

"I give, devise and bequeath, unto my dear wife, Jane C. Myers, all of my property . . . to take, have and receive the same, and the profits thereof, during her natural life, so long as she shall remain my widow and unmarried."

From and after her death testator devised all of his property, in trust, to trustees, to sell and convey said

property, the proceeds of said sales to be distributed to his daughters, as provided in said will.

The court held the remainder to be vested.

Justice Cox, delivering the opinion of the court, said:

"We are unanimously of the opinion that this gave to her an estate for the term of her life, and that the words 'so long as she remain my widow and unmarried' are merely a qualification or condition attaching to that estate, a condition subsequent upon the breach of which the estate is liable to be defeated; that is, if the widow should marry, the heirs might enter and dispossess her, and that might defeat the remainder over, but until the breach of the condition it remains a complete life estate in the widow" (p. 520).

In the case of *O'Brien vs. Dougherty*, 1st Appeals, D. C., 148, one Rodney O'Brien devised all of his residuary property to his wife, for life, in the following language:

"All my right, title and interest in and to the same, during her life, she paying the taxes thereon, as they may become due from time to time *and after her death to revert* to my surviving children."

Testator left a widow and several children surviving him. On a bill for the construction of the will, the court held that the interest of the children was vested and not contingent. Chief Justice Alvey, speaking for the court, said:

"Then again, the construction that the term *surviving* refers to the death of the testator, rather than to the death of the tenant for life, conforms to and promotes the well settled rules of construction, founded in principles of reason and policy, *such as that a remainder will never be construed to be contingent when it can be taken*

to be rested; and that estates shall be held to rest at the earliest possible period, unless there be a clear manifestation of the intention of the testator to the contrary" (p. 157).

In the case of *Richardson vs. Penicks*, 1st App. D. C., 261, the will of George W. Lawrie was before the court for interpretation. It devised to testator's mother certain property, *during her natural life, and after her death, to testator's son, upon his attaining his majority*. It further provided that in the event of the death of testator's mother, before his son should arrive at the age of twenty-one years, then the property was to go to his sister, until the son should arrive at the age of twenty-one; and with a further provision that in the event of his son dying before testator's mother, "*then and in that event*" the property was to go to his sister, upon the death of his mother. The residuary clause devises all the residue of his estate to his mother. The court held that the remainder of the son was vested.

Justice Shepard, speaking for the court, said:

"We think it reasonably clear that the testator did not intend to die intestate as to any part of his estate. . . . Evidently he must have supposed that the lot in controversy had been already devised in its entirety" (p. 265).

In the case of *Thaw vs. Ritchie*, 136 U. S., 519, Joseph Thaw by his will devised all of his property to his wife, "to have and enjoy during her natural life," in trust, for the maintenance of herself and her two children. The will provided that if either child died before majority, then she was to hold said property for herself and her surviving child. On the death of both of said children before his wife, she was to take the same during her natural life for her sole use and benefit. Unto his two

children he gave and devised all that shall remain after the death of their mother, testator's wife. If either of them should not survive their mother, then the survivor was to take the whole.

The will contained the following clause:

"If both of my said children die before their mother, then, on the demise of the last survivor of them, I give and bequeath to my beloved wife Eliza, and her heirs and assigns forever . . . all my estate of every description."

The court held that the children took a vested remainder in fee, subject to be divested by their dying before the widow (p. 545).

In the case of *McArthur vs. Scott*, 113 U. S., 340, the court held that words in a will directing land to be divided among remaindermen, *at the expiration of a particular estate, are to be presumed, unless clearly controlled by other provisions, to relate to the beginning of enjoyment by remaindermen, and not to the vesting of title in them.*

The test of the character of a remainder is the present capacity to take effect in possession should the particular estate now terminate, not in the probability or improbability, possibility or impossibility, of its outlasting the particular estate.

The Vice-Chancellor in the case of *Williamson vs. Field*, 2 Sanford's Chancery, 608, thus states the rule:

"It is the present capacity of taking effect in possession, if the possession were to become vacant, not the certainty that it ever will become vacant, while the remainder continues, which distinguishes a vested from a contingent remainder; in other words, in the former the enjoyment is uncertain, in the latter the right to the enjoyment."

The Supreme Court of the United States, by Justice Swayne, in the case of *Croxall vs. Shererd*, 5 Wall., 288, thus distinguishes a vested from a contingent remainder:

"It is the present capacity to take effect in possession if the present estate should determine which distinguishes a vested from a contingent remainder."

This court has gone to great lengths to hold a remainder vested rather than contingent, and held in this case that:

"Where an estate is granted to one for life, and to such of his children as should be living after his death, a present right to the future possession vests at once in such as are living, subject to open and let in after-born children, and to be divested as to those who shall die without issue."

The struggle with the courts has always been for that construction which gives to the remainder a vested rather than a contingent character. A remainder is never held to be contingent when, consistently with the intention, it can be held to be vested.

Croxall vs. Shererd, 5 Wall., 287.

Mr. Justice Gray said in the case of *McArthur vs. Scott*, that:

"For many reasons, not the least of which are that testators usually have in mind *the actual enjoyment rather than the technical ownership of their property*, and that sound policy as well as practical convenience requires that titles should be vested at the earliest period, it has long been a settled rule of construction in the courts of England and America that estates, legal or equitable, given by will, should always be regarded as vesting immediately, unless the testator has *by very clear words* manifested an intention that they should be contingent upon a future event."

In accordance with this principle, it was held in the case of *Poor vs. Considine*, supra (p. 476), that the fact that a remainder is so limited that it may be divested either in whole or in part, upon the happening or not happening of a subsequent event, will not prevent its being construed as a vested remainder.

The case of *Linton vs. Laycock* turned on the clause in a will directing real estate to be divided when testator's youngest son arrived at the age of 21 years, amongst his children, *then* living, or *their heirs*. The court held that the estate *vested* on the death of the testator, and in deciding the case, said:

"The words of futurity, importing contingency, are not regarded as a condition precedent, or as postponing the period of vesting, but as specifying the time when the remainderman is to take possession."

There were no words of gift or devise in the will, except what might be implied by the direction to divide.

33 Ohio State, 128.

The case of *Tayloe vs. Mosher* is much in point. By the residuary clause of the will before the court in this case, testator devised all of his property, personal, real and mixed, to trustees, to accumulate the income until the time of division; and upon the death of his son William, to divide all of said property and accumulations among the children of a deceased son, and of his son William, *provided any child he should leave*, per capita. No mention is made of his grandchildren in any other part of his will; no part of the income from the estate is to be paid to the devisees until the period of distribution arrives; there is no limitation over, and no provision made for issue or survivorship of individuals of the special class; there is no antecedent gift of which the enjoyment could be postponed. There is no gift or devise,

except the direction to pay. The court nevertheless held that the estate vested on the death of the testator. Judge Miller, in a carefully considered opinion, said:

"The direction here is not to distribute to the grandchildren at or upon their attaining any particular age, nor upon their filling any particular character, such as marriage or attaining puberty, but it is simply to distribute the estate to all the testator's grandchildren, *upon the death of his son William, an event certain to happen*. Estates will be held to be vested, whenever it can be done without doing violence to the language of the will, *and to make them contingent there must be plain expressions to that effect, or such intent must be so plainly inferable from the terms used as to leave no room for construction.*"

29 Md., 454, 456, 457.

This case is cited and followed in—

Fairfax vs. Brown, 60 Md., 50.

Justice Swayne, speaking for the court, in the case of Poor vs. Considine, lays down the following rules as to the vesting of remainders:

"It is a rule of law that estates shall be held to vest at the earliest possible period, unless there is a clear manifestation of the intention of the testator to the contrary.

"Adverbs of time, as where, there, after, from, etc., in a devise of a remainder, are construed to relate merely to the time of the enjoyment of the estate, and not the time of the vesting in interest.

"The law does not favor the abeyance of estates, and never allows it to arise by construction or implication.

"When a remainder is limited to a person *in esse and ascertained*, to take effect by *express limitation*, on the termination of the preceding particular estate, *the remainder is unquestionably vested.*"

6 Wall., 475, 476.

Subject to the life estates of the mother and daughters, the remainder of Metropolis View was to go to testator's daughters living at the time of his death. All of these were alive on the happening of that event. The description of the class that were to take, and the event upon which the parties were to be vested in interest, as clearly identifies them, as though the devise had been made to them by name. At the time of making his will, some of testator's daughters were of marriageable age. It was possible that one or more of them might die before him, leaving children or descendants. To provide for such a contingency, the will substitutes the children or descendants of any of his daughters who may die before him, in place of such daughters. His daughters stand next to him in the order of nature. He names them first in the devise, and the law makes them the favorite object of his bounty.

Barber vs. Pittsburgh, etc., Ry. Co., *supra*.

The event upon which the remainder was limited was certain to happen by the efflux of time; it was not certain, at the time that testator wrote his will, that all of his daughters would marry; it was probable that some of them would; *it was certain that there would come a time when the last unmarried daughter would die*; then the remainder was to vest in possession, and the corpus of the estate be divided.

The persons who were to take were in esse and ascertained at the time of testator's death. The remainder was limited to take effect upon an event that was certain to happen—on the termination of the life estates, either by the marriage of all the daughters, or the death of the last unmarried daughter. The remainder comes clearly within the rules laid down by Justice Swayne for the vesting of remainders.

Chief Justice Shepard, after a review of the authorities and stating the rules governing the vesting of remainders, said:

"Applying these rules, we are of the opinion that, by the provisions of the fifth item of the will, the daughters of the testator, who were all living at his death, took a vested interest in the Metropolis View farm, to come into possession and enjoyment upon the termination of the life estate of the wife and the death of the last surviving daughter, unmarried. The direction for sale and distribution among the daughters 'living at my death' fixes that as the time of the vesting of the right in the said daughters."

33 Appeals, D. C., 257.

An associate justice of the Supreme Court of the District of Columbia, in Equity Cause No. 500, and the chief justice of the same court, in this cause came to the same conclusion. The distinguished counsel representing appellants in this case, in a formidable brief, assails the correctness of this interpretation. As a preliminary to his citation and discussion of cases, he boldly strikes out the words "*living at my death*" from the text of the item of the will under discussion. He cites no authorities touching the power of the courts, in interpreting wills, to strike out clauses therein as a help to ascertain the true intent of a testator, as disclosed by the language used by him in writing his will. It is true he calls attention to the strong utterances to be found in some of the decisions of this court against defeating the intention of a testator by construction, but he cites no case; nor does he seem to fear the implied anathema contained in such utterances against a party so offending.

The words to be stricken from the will are not technical, involving special knowledge either of the law or an art. They are words whose meaning the testator must have

known. He makes use of the identical phrase in the second item of his will, and phrases of like import are used in the first and sixth items thereof. The title to all of the property bequeathed and devised by the will, unless that given by the item in controversy is an exception, is made to vest at testator's death. The apt use of technical legal language in limiting the estates devised by the will, shows that the writer had some knowledge of law. A person so qualified, in writing his own will, would be little likely to use untechnical language, in a manner not to express his thought. Touching the time of the sale of the Metropolis View farm, and the division of the proceeds thereof, his vision undoubtedly extended beyond the time of his death. All of his daughters might not be married at the happening of that event, or soon thereafter; perhaps some of them not at all; he knew this, and he postponed the time of sale, and the enjoyment of the corpus of the estate, solely on account of this contingency. This purpose is not inconsistent, but is in entire harmony with his clearly expressed wish, that the title of the proceeds of this sale, or the property itself, should vest in his daughters, at his death. He carves a life estate out of Metropolis View, for his wife, and intends for his daughters to have the remainder of the property; he makes no mention of it elsewhere in his will. The argument that he made the remainder contingent, in order to deprive his daughters' future husbands of any interest in the devised property, is of no weight. The conveyance to be made by the sons, to the daughters, in the first and second items of the will, are of estates in fee; no attempt is made to exclude the marital rights of his daughters' future husbands from attaching to the property.

By the fourth item of the will, one-sixth of the personal property bequeathed thereby is to be delivered to each of his daughters, on her marriage; by the sixth

item, the residue of his personal estate must be equally divided among his children, at his death; no mention is made, in either item, of the daughters' husbands. Assuming the remainder under discussion to be contingent, the possibility of its becoming vested by the marriage of all of his daughters, or the marriage of some and the death of the others, must have been present to the mind of testator, in writing his will. The devised real estate is to be converted into money, and as money to be paid to his daughters; by such payment he must have known that it would at once pass to and become the absolute property of the husbands, under the law as it then existed; yet he in no way seeks to protect them from this result. The fact appears to be that the testator did not greatly fear the men that might become the husbands of his daughters. He did not assume that they would marry brigands who would wrest from them their heritage. The learned counsel for appellants must produce some reasons more relevant than those found in his brief, before the court would be warranted in striking out a clause deliberately written into the will by testator's own hand.

That the remainder in question should vest in right on the death of Washington Berry, and not at some subsequent time, is in consonance with and not in violation of the rule of interpretation requiring remainders to vest at the earliest possible moment consistent with the intention of testator, as shown by the language employed in making the devise. The phrase in question can not be effaced because it violates any rule of law.

In cases of doubt as to whether a remainder be vested or contingent, it is a circumstance of weight in favor of its being the former, where the beneficiaries are the children of the testator.

The cases cited in this brief on the point under discussion are nearly all local. No attempt has been made to assemble or discuss cases from other jurisdictions. The attitude of the court, touching contingent and vested remainders, is so well defined in these cases, some of which went up from the courts of the District of Columbia, that an examination of authorities from other jurisdictions would be a work of supererogation. The rules governing the vesting of remainders, and distinguishing between vested and contingent remainders, are not in process of formation, but have long been settled under a uniform series of decisions. If the principles of interpretation prevailing in other forums agree with those of this jurisdiction, a citation of them is not necessary; if they disagree with those in force here they must be put aside.

Most of the cases cited in appellants' brief are from other jurisdictions. None of them depart from the rule of interpretation laid down in the case of *Smith vs. Bell*, 6 Peters, 68. This rule may be thus formulated: That the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law.

These cases can have no application to the point under discussion, if the words "living at my death," remain as a part of the will. That or any similar phrase is not found in any of the wills discussed in the cases found in appellants' brief. Some of them relate wholly to personal property, in which futurity is annexed to or made a condition of the gift. The rules governing such bequests are derived from the civil law, and have no application to devises of real estate, which are governed by the rules of the common law.

15 S. and R., 195.

Hawkins on Wills, 2d ed., 222.

No useful purpose would be served by a review of the authorities cited by appellants on the point in question.

The wills before the court in the cases cited differ widely from each other, and more widely from the case at bar. As was said by the court in the case of *Allender vs. Keplinger*, 62 Md., at page 12:

"Unless words have acquired a fixed, definite, legal meaning, their construction is always liable to be modified by the context; and their interpretation in one will can not be adopted in the case of another where it would defeat the intention of the testator."

Justice Merrick, in construing the will in the case of *Sheriff vs. Brown*, 5 Mackey, at 176, said:

"Adjudications upon the construction of wills add very little to the capacity of a court to ascertain precisely what a testator meant.

"Every will, unless it embraces and covers the use of technical terms, to which a definite legal operation has been assigned by the law, must be interpreted by the language of the will itself, subject, of course, to certain general principles of construction, but not to be qualified unless under very peculiar circumstances, by decisions under this or that will which may present some supposed analogy to the terms used in the will in question."

The same doctrine was announced in more forcible language, by the Vice-Chancellor, in deciding the case of *Vaughan vs. Headfort*, 10 Sim., 641:

"This case shows, as I have often observed before, that no light is thrown on questions like the present by quoting other cases. By the laws of this country every testator in disposing of his property is at liberty to adopt his own nonsense; and a decision on the expressions used by one testator seldom affords any clue to the meaning of another."

Such a result necessarily follows from the rule making the intention of the testator the first rule of construction to which all other rules are subsidiary.

Earnshaw *vs.* Daly, 1 App. D. C., 218.

De Vaughn *vs.* De Vaughn, 3 App. D. C., 50.

Tested by the decided cases of this jurisdiction, as well as upon principle, the remainder devised to the daughters of Washington Berry is vested and not contingent.

The court below rested its judgment on this point and declined to pursue the discussion further. In concluding its opinion it said:

"We are of the opinion that by the fifth item of the will the daughters of the testator, who were all living at his death, took a vested interest in the Metropolis View farm, to come into possession and enjoyment upon the termination of the life estate of the wife, and the death of the last surviving daughter unmarried. The direction for sale and distribution among the daughters 'living at my death' fixes that as the time of the vesting of the right in said daughters.

"Having concluded that the daughters of the testator took a vested remainder in the Metropolis View homestead, there is no occasion to consider the power of the equity court exercised in October, 1865, to advance the time of the sale of the same, upon the petition of the parties interested, to a time preceeding the death of the unmarried daughter, who waived her right, and consented thereto.

"The parties obtaining the benefit of that decree would be estopped to impeach it in any event, and the appellants have no right, title, or interest to furnish a foundation for their impeachment.

"We think the third point of the appellants is embraced in the conclusions announced.

"There was no error in the decree granting the prayer of the appellee's bill, and it will be affirmed with costs."

33 Appls. D. C., 257, 260.

It makes no difference whether the remainder to the daughters of Washington Berry be vested or contingent, *if the Supreme Court of the District of Columbia, holding an equity court, had jurisdiction to accelerate the time of the sale and entertain a bill for partition during the life of an unmarried daughter.*

This brings us to the third point in the case.

III.

The Court Had the Right to Accelerate the Time of Sale.

Under the circumstances disclosed and set out in the bill, answer, and depositions and auditor's report in Equity Cause No. 500, under which the property was sold, the court had the right to accelerate the time of the sale of the property devised by the testator in his will.

This will clearly appear by reference had to the evidence, the auditor's report, and the first sentence of Item 5th of the will.

John A. Middleton, the husband of Anna Maria Middleton, one of the daughters of Washington Berry, testified as follows:

"I think the property is now in very poor condition. The house is in poor condition, out of repair. The family vault is entirely broken up. The bodies were removed by the family. The land, portions of it, was naturally very poor. At the time of Mr. Berry's death there was a good deal

of fine timber. Some, not all, of it has been cut down. The fences are very poor; much of it removed or destroyed, but not entirely. I do not think that as a farm it could be cultivated with a view to an income. Mr. Berry did not use it for any such purpose. He only used it as a residence. He did not farm it to any extent. He did not make it sustain itself. In my opinion the farm will not sustain itself. It is a place for an amateur farmer (Rec., p. 22).

The capital raised from it by a sale would be much more productive than the real estate itself could possibly be.

Eliza Thomas Berry (the only unmarried daughter) *consents to give up her right of occupation, and the result of her so doing will be to give the other daughters, including the one under age, the present enjoyment of the devise to them, instead of having that enjoyment deferred until Eliza either dies or marries. Eliza has not resided on the farm since about a year after her father's death, the widow declining to use it as a residence for herself and daughters.* The place, since Mr. Berry's death, has produced very little if anything above the expenses, and if the repairs had been properly attended to, it would have brought the place in debt" (R., p. 23).

Erasmus I. Middleton testified as follows:

"I have known the property called Metropolis View for the last thirty years, living near it all that time, with the exception of three or four years. I know the place intimately, and have been the agent for it for the last three years or thereabouts. . . . There is a large portion of the land (back land) very poor. . . . The last two years the property has not much more than paid the taxes on it. . . . For the last five or six years the estate has yielded comparatively nothing" (Rec., p. 23).

The auditor found and reported to the court:

"That his widow shortly after the testator's death, discontinued her residence at the said homestead, and removed with her family to the city, and has since died.

"That all the said daughters have married, except Eliza T. Berry, and are all of full age except Rosalie E.

"That Eliza T. Berry has not resided at the said homestead since her mother left it, and now offers to give up her right of occupation, so as to advance the period of sale directed by the testator" (Rec., p. 20).

The purpose for which Washington Berry devised a life estate in Metropolis View to his wife and daughters is declared in the following language:

"It is my will and desire that my said homestead shall be kept and continued as the home and residence of my daughters so long as they shall remain single and unmarried" (Rec., p. 17).

If effect is to be given to the declared purpose of the testator, his daughters took a life estate in Metropolis View, subject to the restriction that they remain single, and to the condition that they *keep and occupy said messuage and premises as their home and residence*. By this provision, they acquired no interest that they could sell or lease; it was stripped of the ordinary incidents of property; it was a naked privilege or right to reside upon the premises so long as they were unmarried. There is nothing in the will that prevented Eliza T. Berry, being sui juris, from waiving that privilege, or surrendering that right. She is not prohibited from so doing. The bill is silent as to what should happen in the event this express desire fails of fulfillment. If this be not the true meaning of this provision of the will, then the daughters took a life estate, subject to be

defeated by their marriage. In that event, the ordinary incidents which inhere in such an estate, must be attached to that under discussion. One of these incidents is the *jus disponandi*; and Eliza T. Berry had the absolute right of selling or disposing of her life interest, at pleasure; by waiving her right thereto, by a solemn declaration in Equity Cause No. 500, she did what was equivalent to conveying her life estate, in fee, to the remaindermen, herself included. The life estate thereby became merged in the fee. The circumstances considered, the act was wise, and the only reasonable thing to do. By the testimony in the case, the right or privilege had become worthless. The farm was poor, fences broken down and destroyed; much of it not susceptible of tillage. The property could not be rented to advantage at all, and had it been rented, the rentals would have had to be applied to keeping the premises in repair, and in the payment of taxes, otherwise the inheritance would have become wasted. The net residue of the rents could not have been received and used by the said Eliza T. Berry, for her own purposes, but must have been divided equally with her sisters, unless she had chosen to reside on the premises. The desire of the testator to keep the homestead as a residence for his wife, and his daughters, while unmarried, was defeated, not only by circumstances over which they had no control, but by their own voluntary act. His widow lived on the property one year after his death, then moved to the city, and neither she nor her daughters afterwards resided there. The court, in Equity Cause No. 500, proceeded upon the theory that under this condition of affairs it had the power and jurisdiction to decree a sale of the property. If there resided such a power in the equity court, the decree rendered in that case is impregnable to collateral attack. The validity of the decree

could only be assailed by an appeal, or some proceedings taken in the case itself.

Under the circumstances the court had the power, and it was its duty, to accelerate the time named by the testator in his will for the sale of Metropolis View.

The case of *Coltman vs. Moore*, 1 MacA., 197, was a bill filed for the construction of the last will and testament of Charles L. Coltman, deceased. The will bequeathed certain personal and real estate to his wife and all the rest of his property he devised in trust to a trustee to hold the same for the period of twenty years after his death, with power to collect the rents and income from his estate during that period and apply the same to the payment of a certain annuity to his widow. At the expiration of said term he directed the trustee to sell the real estate, or divide the same in specie, reserving enough to pay said annuity and divide the proceeds between himself and three sisters, the issue of a deceased child to take the share of the deceased parent. In the event none of said children die leaving issue, then, at the expiration of the term of twenty years, all of the residue of his property was devised to the city of Washington to establish a house of refuge for destitute reputable females. The bill avers that the proceeds from sales of other of the property is sufficient to pay the annuity, and that the remainder to the city of Washington is void for indefiniteness. The complainants in the bill were the widow and some of testator's children against others of his children. The court held that the general intent of the testator must control the interpretation of his will, even though some special details in its execution be disregarded, and decreed that the children of the testator took a vested title in fee simple and the period of division was accelerated.

In the case of *Worthington vs. Randall*, Equity No. 8498,

in the Supreme Court of the District of Columbia, the court, by Justice Cox, decided, in 1884, on full argument on exceptions to an auditor's report that the distributees named in the fourth item of the will of George Augustin Washington Randall took indefeasible vested interests at the time of the death of the testator. This item reads as follows:

"I will and direct and so require that ten (10) years after my death all my real and personal property situated in the District of Columbia, shall be sold to the best advantage by my executors, hereinafter named, and the net proceeds arising from the sale of said real and personal property is to be divided equally among the following named heirs, to wit: Milton C. Randall, William L. Randall, Charles S. Randall, Louisiana M. Randall (now Mrs. Knox) and Sarah L. Randall (now Mrs. Boden) children of my deceased brother, William Washington Randall, and Voltaire Randall, son of my deceased brother, John Randall, George C. Randall and Kate Randall children of the said Voltaire Randall. The said heirs to receive the same share and share alike; and in case of the death of either of the above named heirs, I will and direct and so require that the share of the deceased one shall go to the proper heirs or distributees of the same."

In the case of Trustees of Church Home, etc., vs. Morris, 36 S. W. Rep., 2, by the will of John P. Morton, the income of his entire estate was to go to his wife as long as she lived. Upon her death her estate was to be distributed to certain specific legatees, with a residuary clause to certain charitable institutions. The widow renounced under the will and took her distributive interest under the law. The residuary legatees contended that the estate was not to be distributed until the widow's death, the income in the meanwhile to accumulate for

their benefit. The Court of Appeals of Kentucky, in reversing the court below, held that the distribution was to be made at once. The court said:

"The only reason we can see for the testator's postponement of the distribution until the death of his widow was that she might be provided for, and when that reason for postponement ceased, as it did upon her renunciation, we can not see why those who were the chief objects of the testator's bounty should be delayed in the enjoyment of their legacy."

The will In re estate of Rawlings, 81 Iowa, 701, provided for the payment of testator's debts, remainder to his wife for her lifetime, and at her death to be equally divided among his children. By a codicil testator directed one of his sons to keep the farm and his wife and his son's wife to constitute a family and to have their support from the income of the farm. The widow renounced. Chief Justice Beck, in deciding the case, said:

"As she refuses to take under the will that part of the items relating to the keeping of the property can not be obeyed, and must be left out of view. The same is true as to the widow's life estate. . . . It clearly appears that the testator intended that the devisees just named should take the property after its enjoyment by the widow ceased and after her interest therein was terminated" (p. 706).

In the case of *Randall vs. Randall*, 85 Md., 431, testator devised his estate to trustees in trust for his widow for life for her protection, and that of his minor children. Upon the death of the wife it was to be held for the protection of the minor children until they were of age or married. Upon the expiration of the estate to the wife and the minority of the children, the trust was to cease. The children of the testator were to take. The widow

renounced. The children being all of age and married, the court held they were entitled to a distribution. Judge Briscoe, after discussing the authorities, said:

"There can be no doubt as to the correct conclusion that should be reached in this case, and that is, the widow's renunciation and election accelerated the devise and bequest to testator's children and terminated the trust" (p. 440).

In *re* Woodburn's estate, 151 Pa. St., 586, testator gave to his widow one-third of the income from his whole estate. The use of the remaining two-thirds he gave to his children during the life of the widow; on her death to be equally divided among them. On the renunciation by the widow the court directed a division of the estate and said:

"The trust here is ended not because the beneficiaries are sui juris and desire it, but because the testator's purpose in creating it is no longer subserved by its continuance" (p. 590).

In *re* Ferguson's estate, 138 Pa. St., 208, testator devised his household furniture to his wife and certain realty to her for life. He then directed that the residue of his personal property and certain real estate should be sold and the proceeds invested, and the income therefrom should be paid to his wife during life. Upon his wife's death he directed that all his property be sold and the proceeds divided, a portion of the proceeds to go to certain specific legatees and the residue elsewhere. The widow renounced. The specific legatees claimed an immediate division of the estate. The court held they were entitled to such distribution. Justice Mitchell, in his opinion, said:

"The principle is well settled that equity will depart from the literal provisions of the will in order to carry out a superior or preferred intent of the testator which would otherwise fail. . . .

The exact scheme of the testator has been somewhat disarranged; but taking out the widow's share and treating her election as equivalent to her death, there is nothing at all in the way of carrying out the remaining directions of the will literally " (pp. 219, 220).

This case reviews the other Pennsylvania cases and has been frequently cited by courts of other jurisdictions.

To the same effect are the following cases:

In re Schulz's Estate, 113 Mich., 592.

In re Vance's Estate, 141 Pa. St., 201.

The rule is thus stated in the case of *Slocum vs. Hogan*, 176 Ill., 539.

"The doctrine of acceleration proceeds upon the supposition that, though the ulterior devise is in terms not to take effect in possession until the decease of the prior devisee, if tenant for life, yet that, in point of fact, it is to be read as a limitation of a remainder to take effect in any event which removes the prior estate out of the way."

Jarman, in Vol. I (5th Ed.), p. 574, states the doctrine in substantially the same language. He says:

"The doctrine evidently proceeds upon the supposition that, although the ulterior devise is in terms not to take effect in possession until the decease of the prior devisee if tenant for life, or his decease without issue, if tenant in tail, yet that, in point of fact, *it is to be read as a limitation of a remainder to take effect in every event which removes the prior estate out of the way.*"

Blatchford vs. Newbury, 99 Ill., 11, enunciates the principle thus:

"Whether the life estate is determined by a revocation, or by death, or by the renunciation of the widow, or by any other circumstance which

puts the life estate out of the way, the remainder takes effect, *having been only postponed in order that the life estate might be given to the life tenant.*"

The doctrine is founded upon the presumed intention of the testator that the remainderman should take on the failure of the previous estate.

Blatchford vs. Newbury, supra.

The reason of the principle is thus stated in Coover's Appeal, 74 Pa. St., 143:

"Where an event turns up which the testator had not contemplated, a court is compelled to inquire how he would have provided for it had it been foreseen—in short, to suppose an intention for him when he had none."

While the remainder is limited in the case at bar, to take effect upon the determination of a life estate to testator's daughters, being single and unmarried, ought it not to be read, in the light of these authorities, as a limitation of—

"a remainder to take effect *in any event* which removes the prior estate out of the way? And this not because the beneficiaries are *sui juris* and desire it, but because the testator's purpose in creating it is no longer subserved by its continuance?"

According to the theory of the appellants each of the daughters of Washington Berry had a life estate in Metropolis View, which was to terminate on their marriage, and had also the possibility of acquiring a fee in the remainder of Metropolis View after the death or marriage of all the other daughters. Such a construction is not warranted by the language of the will, is in violation of the ordinary motives which govern mankind

in disposing of their property, and ought not to prevail except where the intent of the testator is so clearly and imperatively expressed as to leave no room for construction.

Judged by the event, what a perversion of the intent and purpose of Washington Berry, as expressed in his will, would have been wrought had the court, in Equity Cause 500, put upon it the construction now urged by appellants. None of the daughters would have had any beneficial use or enjoyment of the property during their lives. The married daughters could not have lived there, by the terms of the will; the unmarried daughter, because of the condition of the property. The children of the married daughters would have had no beneficial use or enjoyment of it, until middle age. Such results could not have been in the mind of testator when he wrote his will, and yet they must be considered as events that would probably occur, if the words "living at my death" are stricken from the will, and the interpretation put upon it, thus mutilated, urged by appellants.

IV.

Rule of Property.

The doctrine of *pare decisis*, as applied to titles of real property, is well stated by Justice Morris in the case of *Middleton vs. Parke*, 3 App. D. C., 149. The question in the case was as to whether the Orphans' Court of this District had power to authorize a guardian to mortgage his ward's estate. In discussing this feature of the case the learned justice said:

"We are informed that the course of procedure which was followed here has now been practically discontinued in consequence of the repeated attacks upon it, yet it is quite apparent that the procedure itself was generally accepted in the

community, by the legal profession and by the courts, as proper, and that many titles now depend upon it; and we should certainly hesitate to disturb and unsettle such titles without very clear demonstration that the procedure was wholly unwarranted in law. A construction of law that has been enunciated by the courts and accepted and acted upon by the community, and which thereby has become a rule of property, should not be lightly overthrown, even though that construction, upon further and fuller consideration in the light of experience, might not commend itself to the judicial mind. The maxim of *stare decisis* does not imply a mere blind adherence to precedent; it is a guaranty of peace to the community and of stability of acquired rights, which ought not to be divested by a change in the judicial mind " (p. 158).

The principal question in the case of *Thaw vs. Ritchie* (5 Mackey, 200) was as to whether the Orphans' Court, with the approval of the Circuit Court of the United States for the District of Columbia, sitting in chancery, had jurisdiction to order the sale of real estate of infants for their maintenance and education, under an act of Maryland passed in 1798, which became part of the law of this forum on the cession by the State of Maryland to the United States of the territory embraced within the District of Columbia. The question had never been passed upon by the Court of Appeals of Maryland at the time of the cession. The Circuit Court of the District of Columbia and its successor, the Supreme Court of the District of Columbia, construed the statute up to the time of the bringing of this case as conferring such power. Justice Cox, in deciding the case, said:

"The practice of decreeing such sales has prevailed through a period of sixty or seventy years in extent; large amounts of property have changed

hands through such sales, and many titles depend upon their validity. If anything can be said to be a rule of property in this District, our interpretation of the statute must be so considered" (p. 213).

The court held that they would not be justified in reversing its construction of the statute, although that construction might in fact be regarded as erroneous. This case was affirmed in 136 U. S., 519, on the express ground, however, that the interpretation so placed upon this statute was correct.

A statute of the State of Pennsylvania provided that deeds should be acknowledged or proved "before one of the justices of the peace of the proper county or city where the lands lie." The deed was acknowledged before one of the justices of the Supreme Court of that State. The question was as to whether it was properly acknowledged. The court held that if the act be construed for the first time, the opinion of the court would certainly be that the deed was not regularly proved, as a justice of the Supreme Court would not be deemed a justice of the county, within the meaning of the act. The court by Chief Justice Marshall said, in the case of *M'Keen vs. Delancy's Lessee*, 5 Cranch, 22, 32:

"But, in construing the statutes of a State, on which land titles depend, infinite mischief would ensue, should this court observe a different rule from that which has been long established in the State; and in this case the court can not doubt that the courts of Pennsylvania consider a justice of the Supreme Court as within the description of the act."

For this reason the court held the deed properly acknowledged.

In holding that words of survivorship in a devise after

a particular estate related to the death of the testator and not to the termination of the particular estate, Chief Justice Alvey said, in the case of *O'Brien vs. Dougherty*, 1 App. D. C., 148:

"That rule, as to devises of real estate, has not been supplanted in England by any definite and conclusive announcement of the highest court of the Kingdom; and we see no good or sufficient reason for departing from it. To do so might be the means of disturbing titles otherwise good, and it is universally conceded that in no branch of the law is it more important for the courts to adhere to fixed and settled rules than in that relating to real property" (p. 162).

The Supreme Court of the United States does not feel itself bound to follow the later decisions of the highest court of a State construing a statute when those decisions are in conflict with its prior decisions. Especially is this true where contract rights have intervened which might be injuriously affected by following the later decisions. On this point Chief Justice Waite, in the case of *Douglass vs. County of Pike*, 101 U. S., 677, said:

"After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment" (p. 687).

In the case of *Doolittle's Lessee vs. Bryan*, 14 Howard, 563, the question was as to whether an act of Congress passed May 17, 1800, repealed section 23 of the Judiciary Act of 1789, so far as to make a sale on a writ *venditioni exponas*, by a marshal after he had been removed from

office, void. The court held that it did not. Justice Grier, speaking for the court, said:

"In the present case, it is said, the land was sold in 1829. The purchaser paid his money and obtained his deed upon the faith of a judgment of the court that the sale was regular, and has held the land under this title ever since. Hundreds of similar cases may probably be found where the same objections to the sale exist. *Under such circumstances a court should be even astute in avoiding a construction which may be productive of much litigation and insecurity of titles*" (p. 567).

The mere possibility that a decision of the court that the power of a trustee to sell through an agent had been followed as a rule of property, was sufficient to deter the Supreme Court of the United States from departing from it.

Smith *vs.* Black, 115 U. S., 308.

The Supreme Court of the District of Columbia, in Equity Cause No. 500, necessarily put the construction contended for by complainant upon the will of Washington Berry; otherwise, it would have been without jurisdiction to decree a sale of Metropolis View. This case was referred to the then auditor of the court, and in a carefully elaborated opinion by him, he reported not only in favor of the jurisdiction of the court to make the sale, but of its propriety under the conditions which were disclosed by the evidence taken in the case, which was reported by him in full to the court. As to the weight and consideration which are to be given to the findings of an auditor, the Court of Appeals of the District of Columbia and the Supreme Court of the United States have repeatedly spoken. The former court, quoting from one of its prior decisions, stated the rule as fol-

lows, in the case of *Hutchins vs. Munn*, 28 App. D. C., 271:

"The findings of a master or an auditor, concurred in by the court below, are to be taken as presumptively correct, and will be permitted to stand, unless some obvious error has intervened in the application of the law or the principles of the decree under which he acts, or some important mistake has been made in the evidence, and which has been clearly pointed out and made manifest" (p. 279).

The court in its opinion cites and quotes from numerous opinions from the Supreme Court of the United States to the same effect.

The construction thus put upon said will has been uniformly followed by real estate lawyers, title examiners and title insurance companies ever since the sales under the decree in said Equity Cause No. 500 were made, a period of more than thirty-five years.

Some of the property has been subdivided into building lots; a part of it is occupied by the St. Vincent's Orphan Asylum; another part by an institution of learning, and numerous private residences have been built upon it. The rights of several hundred persons, either as owners, mortgagees or tenants, stand upon the interpretation placed upon said will by the court below, and the decree of sale passed in said Equity Cause No. 500. That interpretation, whether right or wrong, has become a rule of property, upon which people dealing with it have relied for a period of more than a generation. The effect of a decree now changing this interpretation would invalidate all of these titles and bring irreparable injury, if not ruin, to hundreds of innocent people who have bought and dealt with the property, relying upon the correctness of the decree of the court below. The affirmance of the decree in the present case can not

be used as a precedent in other cases of wills; no settled rule of construction can be violated; no landmark of property be prostrated by it. The question was and is only one of intention, to be gathered from the four corners of the instrument in question; the ascertainment of that intention can affect no other case. If the court erred in picking out the true meaning of a will, testator's estate and the beneficiaries under his will ought to bear the consequence of such error, rather than innocent purchasers for value of the property devised. It is testator's fault if his meaning can not be clearly and certainly gathered from the language used by him in making his will. Especially ought this consequence to follow where, as here, the error, if error there be, is only to be established by voluminous brief and laborious argument. The error, if it is to be corrected, ought to be so plain that the fool and wayfarer might run and read.

V.

Estoppel.

The children of the daughters of Washington Berry claim title to Metropolis View under his will. They must claim by purchase and not by descent, or their title is without foundation. If the property descended to them through their mothers, then their right and title thereto is that of their mothers; no greater, no less. Two of them were complainants, two of them defendants, in the suit for partition. All of them desired a sale of the property. It was sold and the trustees conveyed what purported to be a "*fee simple title*" thereto. Every one connected with the sale, including the court, supposed that a good indefeasible title in fee simple was being sold. The purchasers understood that they were getting such a title; otherwise the property could not have been sold at all. The mothers of the defendants who claimed title to the property received full value for a good title. The present owners of Metropolis View,

and those under whom they claim, have paid the taxes and public charges upon it from the time of sale to the present time. Thousands of dollars have been paid by them into the public treasury on that account, and other thousands in improvements made upon the property, by reason of which it has been greatly increased in value. Under these circumstances, testator's daughters, if living, would be estopped from setting up or asserting any title to the real estate in controversy. The acceptance and retention of the proceeds of sale estops testator's daughters, and those claiming under them, from asserting title to the property on the broad principle that no one shall be permitted, after assuming one position, to assume another inconsistent with it, as well as on the narrow doctrine that one can not enjoy the benefits of an act and repudiate its obligations.

Scholey vs. Rew, 28 Wall., 331.

Rader vs. Maddox, 150 U. S., 128.

U. S. vs. Lamont, 155 U. S., 303.

Kahn vs. Peter, 104 Ala., 523.

The acceptance of the proceeds of a sale, private or public, ordinary or judicial, by one who knows or is chargeable with knowledge of the facts, estops from contesting the validity of the sale, unless the sale is absolutely void within the knowledge of the other party.

Creamer vs. Holbrook, 99 Ala., 52.

Ansonia vs. Cooper, 66 Conn., 184.

France vs. Haynes, 67 Iowa, 139.

Cleland vs. Caegrain, 92 Mich., 139.

Jones vs. Bliss, 48 Minn., 307.

McClanahan vs. West, 100 Mo., 309.

Dawkins vs. Dawkins, 104 N. C., 301.

McPherson vs. Cunliff, 11 S. & R. (Pa.), 422.

Smith vs. Warden, 19 Pa., 424.

Williamson vs. Jones, 39 W. Va., 231.

Long vs. Long, 62 Md., 71.

"Equitable estoppels of this character apply to infants, as well as adults, to insolvents, trustees and guardians, as well as to persons acting for themselves, and take place as well when the proceeds arise from a sale by authority of law, as when they spring from the act of the party."

Commonwealth vs. Shuman, 18 Pa., 343.

Smith vs. Warden, 19 Pa., 424.

The sale in Equity Cause No. 500 was not void in any event. The consent of the life tenant, Eliza T. Berry, to an immediate sale of the property put her life estate out of the way as effectually as would a conveyance of her life interest by deed to her married sisters. If, as appellants contend, the remainder limited to the daughters of Washington Berry was contingent upon and awaited the death of Eliza T. Berry before vesting, then, until the happening of that contingency, the title of the property descended upon and was vested in testator's heirs at law. His heirs at law were his children. They were all parties to Equity Cause No. 500. The sales under the decree in that case vested the purchasers with their title to Metropolis View, which could have been no other than the legal title. That title still remains vested in the purchasers under said sale, or their successors in title, unless divested by the death of Eliza T. Berry. The filing of Equity Cause No. 26,474 by appellants, and their answer to appellee's bill, is a confession that the title was not so divested.

The interests of appellants on their own theory of the case, is equitable and not legal. No notice of any claim of title has been given or made by them at any time. They are all long since of age and some of them past middle life, and are under no disabilities. Good faith imposed upon them the duty of notice. The purchasers of Metropolis View have, in recent years, been rapidly altering their position for the worse if they had no title to the property.

The asserting of title to Metropolis View on the part of the children of Washington Berry's daughters has no ethical basis on which to rest. Their mothers got full value for the property. Directly or indirectly appellants participated in the proceeds of the sale. These proceeds were either expended for their support or for the benefit of the family, or went to swell the estate left by the daughters at their death. One of proper moral sensibilities would not seek to disturb the title of those who in good faith purchased and now own the property sold under Equity Proceedings No. 500. If the appellant's claim is based upon descent, they are estopped; if upon purchase, they have lost their right to maintain it by laches.

It is impossible to review all of the cases cited by appellants in their brief in support of the third and fourth points argued by them, without unduly lengthening this brief. Such course is not necessary or desirable. The wills in the cases cited, on these points, differ so widely in language and terms from the one under consideration, as to furnish striking proof of the inutility of citing cases in aid of the interpretation of wills. The case of *Doe vs. Considine* is an example. The will in that case, in express terms, limited the fee over in case testator's son died without leaving a child or children. The son left a child him surviving, who died in the year following her father's death. The court held that the fee was not thereby divested, but descended to the deceased daughter's heirs at law.

6 Wall., 458.

Another example is the case of *Morehouse vs. Morehouse*. The testator in that case devised an estate to his daughter, in the following language:

"All the rest and residue of my estate, real and personal, of every name and kind whatsoever, I give and bequeath to my daughter, Effie May

Morehouse, subject, however, to the following provisions:—that no part of my real estate shall be sold or in any manner encumbered during her lifetime, and in case of marriage and subsequent death, and should she leave a child or children, then I give the foregoing devise or bequest to her child or children; and provided further, in case of her marriage, and she should die childless, but should leave a surviving husband, then I give to her husband one-third part of said residue and remainder of my estate; the remaining two-thirds to the surviving children of my brother."

The said Effie May Morehouse never married, and died leaving a last will and testament devising the property. The court held that a fee passed by her will, and that the question was one of intent, simply; that from the language used she took a fee in the real estate devised, which could only be defeated by her leaving a child or children her surviving. 33 App. Div., 250.

These cases illustrate the general doctrine that an estate in fee may be limited in a will by means of a shifting use or an executory devise that such a limitation is valid, is conceded; but it is difficult to see how these authorities, and the others found in appellants' brief, can aid the court in the solution of the problem before it.

In the case of *Long vs. Long*, testator's grandchildren took an independent title as purchasers. It was held that they were not represented by the trustees and the life tenants under the will, in a suit for the sale of the fee of the property; that the trust was executed in the trustees during the lives of the tenants for life, and the legal fee was in the remaindermen. The will devised the property to the trustees, in trust, among other things, for the use of testator's children for life, then to the children of such of them as died, and *their heirs*. By the express language of the will, testator's children took but a

life estate, and constituted the termini from which the succession was to take its course. There could be no question but what the remaindermen took the fee under the will. This case is strongly in support of the proposition urged by the appellees, that appellants, to have a scintilla of standing in court, must claim as purchasers under the will of Washington Berry, and in no other way.

62 Md., 33.

It is respectfully submitted that the proper construction was put upon the will of Washington Berry by the court in Equity Cause No. 500, by the Supreme Court of the District of Columbia and by the court below from which this appeal was taken.

The appellee calls the attention of the court to the absence of the assignment of errors, in appellants' record, as required by the statute in that behalf, and the rules of this court; and it claims the same benefit arising from this omission, as though it had made a motion for the dismissal of this cause, and the confirmation of the judgment of the court below, on this account.

B. F. LEIGHTON,
Attorney for Appellee.

JOHNSON v. WASHINGTON LOAN & TRUST
COMPANY.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA.

No. 40. Argued December 8, 1911.—Decided April 1, 1912.

A will contained the following provision: "It is my will and desire that my said homestead shall be kept and continued as the home and residence of my daughters so long as they shall remain single and unmarried. I therefore first after the death of my wife will and devise the said estate to my said daughters being single and unmarried, and to the survivor and survivors of them so long as they shall be and remain single and unmarried and on the death or marriage of the last of them then I direct that the said estate shall be sold by my executors and the proceeds thereof be distributed by my said executors among my daughters living at my death and their children and descendants (*per stirpes*)."

The testator had three sons and five daughters, all of whom were living when the will was made. The will contained provisions for testator's wife and sons. Four of the daughters married and had children; only one of them married before testator's death, and her children were born subsequently. One daughter remained single and survived all her sisters. Nine years after testator's death, the widow having also died, a decree was entered in a suit in which the daughters alone were parties, directing that the property be sold and proceeds divided among the daughters. In a suit brought subsequently by a purchaser to quiet title against claims of grandchildren of the testator, held that:

224 U. S.

Argument for Appellants.

The provision in the will for the sale of the homestead was for the protection of testator's daughters, and the words "living at the time of my death" may not be disregarded, and the daughters had a vested remainder in fee not defeasible as to any of them by her death leaving descendants, before the expiration of the preceding estates.

Although the clause is elliptical, and the provision for representation is not fully expressed, the court finds from this and other provisions in the will that the intent of the testator is clear, in providing for his daughters and their children and descendants *per stirpes*, to establish the right of those daughters who survived him as of the time of his death and to provide for the representation of any who might previously die.

The purchasers under the decree in the previous suit for sale and division of proceeds, acquired a good title under the decree.

33 App. D. C. 242, affirmed.

THE facts, which involve the construction of a will disposing of real estate in the District of Columbia, are stated in the opinion.

Mr. A. S. Worthington for appellants:

Appellants contend that by the words—"On the death or marriage of the last of them (testator's five daughters) then I direct that the said estate shall be sold by my executors and the proceeds thereof be distributed by my said executors among my daughters living at my death and their children and descendants (*per stirpes*)," testator meant that the proceeds of sale which he directed to be made should be distributed among his daughters and their children and descendants as those classes should exist when all of the daughters should be dead or married. Appellee contends on the other hand that the testator meant that the proceeds of sale should be divided among his daughters and their children or descendants as those classes existed at the time of his death; and that as none of his daughters had any children at that time the daughters took the entire remainder after the termination of the life estate of the widow of the testator.

Where the intention of a testator is plain, rules of construction are not to be resorted to for the purpose of determining that the testator did not mean what he has said in his will. *Clark v. Boorman's Executors*, 18 Wall. 502; *Robison v. Female Orphan Asylum*, 123 U. S. 702, 707; *Travers v. Reinhardt*, 205 U. S. 423; *Line's Estate*, 221 Pa. St. 374; *Hood v. Penna. Society*, 221 Pa. St. 474, 479.

The language of this will is so plain that no resort is necessary to rules of construction adopted in construing ambiguous devises. *Burnside v. Wall*, 9 B. Mon. 318.

In this case there was not only a preceding life estate in the widow, but an estate till marriage only in the four daughters who did not remain single. After their marriage no one had a right of possession in Metropolis View except Eliza T. Berry so long as she lived.

Nothing in the will tends to sustain the contention of the appellee as to the proper construction of Item 5th.

There is no rule of law as to the construction of wills which requires the court to overthrow the manifest intention of the testator in this case as to the persons who should share in the distribution which he directed to be made when he should have no living unmarried daughter.

When in a will there is no direct gift of property to the beneficiaries, but merely a direction that after the termination of a preceding life, or other particular estate, it shall be divided among or paid to certain classes of beneficiaries, in the absence of anything in the instrument to indicate a different intention, only those of the classes described who survive till the time fixed for the distribution will participate therein. *O'Brien v. Dougherty*, 1 App. D. C. 148; 2 Williams on Executors, 6th Am. ed., 1232.

When the only gift is in a direction to pay at a future time, and the will does not otherwise indicate any intention to make a present gift, the remainder will generally be construed contingent. 1 Jarman on Wills, 6th Am. ed.,

star page 757, note 2; *Hoghton v. Whitgreave*, 1 Jac. & Walk. 146; *Brograve v. Winder*, 2 Vesey, Jr., 638; *Jones v. Colback*, 8 Vesey, Jr., 38; *Nichols v. Guthrie*, 109 Tennessee, 536; *Richey v. Johnson*, 30 Oh. St. 288, 296; 2 Williams on Executors, 514; Hawkins on Wills, 232; Jarman on Wills (as quoted in 118 Illinois, 403), and Beach on Wills, § 120; *McClain v. Capper*, 98 Iowa, 145; *Benner v. Mawer*, 113 N. W. Rep. 663; *McCartney v. Osburn*, 118 Illinois, 403-423; *Bates v. Gillett*, 132 Illinois, 287, 299; *Matter of Baer*, 147 N. Y. 348; *Stoors v. Burgess*, 101 Maine, 26, 34; *Dougherty v. Thompson*, 167 N. Y. 472; *Matter of Crane*, 164 N. Y. 71, 76; *Lewisohn v. Henry*, 179 N. Y. 352; *In re Hogarty*, 62 App. Div. 79; *Hale v. Hobson*, 167 Massachusetts, 397; *Hobson v. Hale*, 95 N. Y. 588; *Dary v. Grau*, 190 Massachusetts, 482; *Boston Safe Deposit Co. v. Blanchard*, 196 Massachusetts, 35; *Reilly v. Bristow*, 105 Maryland, 326; *Rosengarten v. Ashton*, 228 Pa. St. 389.

That a remainder is vested on the death of the testator does not necessarily determine that the devisee, his heirs or assigns shall be entitled to the property which is the subject of the gift, since the estate so vested may be divested by the death of the devisee before the determination of the preceding particular estate. 2 Wash. on Real Property, star pages 263, 530; 24 Am. & Eng. Ency. 405; 23 L. R. A. 642, note; 27 L. R. A. (N. S.), 454, note.

Assuming that the intention of this testator was that the distribution involved was to be made among his daughters and their children and their remote descendants as those classes should exist, not when he died but when the distribution was to take place, it becomes wholly immaterial whether the chance which each daughter had of being in existence when that time came gave her a purely contingent interest, or a vested interest subject to be defeated by her prior death leaving children or other descendants to take her distributive share in her place. *Myers v. Adler*, 6 Mackey, 515; *Richardson v. Penicks*,

1 App. D. C. 261; *Carver v. Jackson*, 4 Pet. 1; *Croxall v. Shererd*, 5 Wall. 268; *Blanchard v. Blanchard*, 10 Allen, 227; *McArthur v. Scott*, 113 U. S. 340; *Thaw v. Ritchie*, 136 U. S. 519; *Hine v. Morse*, 218 U. S. 493.

Poor v. Considine, 6 Wall. 458; *Cropley v. Cooper*, 19 Wall. 167, can be distinguished, and the reasons given for the conclusion reached in those cases lead to a directly opposite conclusion from that which is maintained for the appellee here. See *Mitchell v. Mitchell*, 126 Wisconsin, 47, 49; *Cripps v. Wolcott*, 4 Maddock Ch. 12; *Hearn v. Baker*, 2 K., K. & J. 386; 69 English Rep. 831.

The same principle was applied in *Stephenson v. Gullan*, 18 Beav. 590; *Knight v. Poole*, 32 Beav. 548, and *Hoghton v. Whitgreave*, 1 Jac. & W. 146. See also 1 Jarman on Wills, 6 Am. ed., star page 547; *Peter v. Beverley*, 10 Pet. 532, 563; *Cropley v. Cooper*, 19 Wall. 167, 174; *Robertson v. Guenther*, 241 Illinois, 511; and see note in 25 L. R. A. (N. S.) 887, 904, containing complete review of the numerous cases in which the question has been whether language similar to that used in that case and in *O'Brien v. Dougherty*, *supra*, makes the interest taken by the "surviving" beneficiaries vested or contingent. About one hundred cases are cited in the note. It was held in all that the remainder was contingent, and except in seven cases where it was held that it was vested subject to be divested by the death of the beneficiary before the termination of the preceding estate. *Hudgens v. Wilkins*, 77 Georgia, 555; *Blanchard v. Blanchard*, 1 Allen, 223; *In re Seamen*, 147 N. Y. 69; *Nodine v. Greenfield*, 7 Paige, 655; *Parker v. Ross*, 69 N. H. 213; *Smaw v. Young*, 109 Alabama, 528; *Acree v. Dabney*, 133 Alabama, 437.

The rule of construction, that a construction which may result in partial intestacy is to be avoided, does not apply in this case.

The language of a will which gives property to certain persons and to their children upon the happening of a

224 U. S.

Argument for Appellants.

future event should not be distorted into a gift to those persons to the exclusion of their children because of the possibility that they may not have any children. *Augustus v. Seabolt*, 3 Metc. (Ky.) 155; *Matter of Disney*, 190 N. Y. 128.

When there is a devise to parent and children—as to parent and descendants—without more, the parent takes a life estate with remainder to such children or descendants. *Ward v. Grey*, 26 Beaven, 485; *Jeffery v. De Vitre*, 24 Beav. 296; *Jeffrey v. Honeywood*, 4 Madd. Ch. 397; *Hall v. Hall*, 78 Atl. Rep. 971; *Hood v. Dawson*, 98 Kentucky, 285; 33 S. W. Rep. 75; *Noe's Admr. v. Miller, Excr.*, 31 N. J. Eq. 234; *Stiles v. Cummings*, 50 S. E. Rep. 484; *Logan v. Hall*, 43 S. W. Rep. 402; *Ballantine v. Ballantine*, 152 Fed. Rep. 775; *Forest Oil Co. v. Crawford*, 23 C. C. A. 55; *Barclay v. Platt*, 170 Illinois, 384; *Kuhn v. Kuhn*, 78 S. W. Rep. 16.

The interests of the children of Washington Berry's daughters were not in any wise affected by the proceedings in Equity Case No. 500 or by the conveyances made by the trustees appointed in that case. *McArthur v. Scott*, 113 U. S. 340; *Bennett v. Hamill*, 2 Sch. & Lef. 566, 577; *Masie v. Donaldson*, 8 Ohio, 377, 381; *Long v. Long*, 62 Maryland, 33; *Marshall v. Augusta*, 5 App. D. C. 183, 194; *Gedges v. Western Baptist Theological Institution*, 13 B. Mon. 530; *Harris v. Strodl*, 132 N. Y. 392, 397; *Firth v. Denny*, 2 Allen, 468; *Hinkley v. House of Refuge*, 40 Maryland, 461; *Lowell v. Charlestown*, 66 N. H. 584; *Sawyer v. Freeman*, 161 Massachusetts, 543; *Estate of Delaney*, 49 California, 76; *Matter of Lorenz's Estate*, 76 N. Y. Supp. 653.

The authorities cited by counsel for the appellee on the subject of acceleration do not support his claim that the failure of a preceding estate by renunciation of the devisee thereof has the same effect as the death of the devisee where that would be inconsistent with the scheme of the

will. *Blatchford v. Newberry*, 99 Illinois, 11, 57; *Coltman v. Moore*, 1 McA. 197, do not support appellee's contention in this case.

Mr. B. F. Leighton for appellee:

The remainders were vested. Testator's direction for a sale of the property and a division of the proceeds among his daughters living at his death was equivalent to a limitation of the title in fee to them, and they could have elected, on testator's death, to take the property instead of the proceeds to be derived from its sale. *Poor v. Consigned*, 6 Wall. 472; *Cropley v. Cooper*, 19 Wall. 167; *Hauptman v. Carpenter*, 16 App. D. C. 524; *Fearne on Contingent Remainders*, 351; *Goodlittle on Whitby*, 1st Burrows, 232.

The legal presumption arising from the making of the will itself is that the testator intended to dispose of all of his property, and not die intestate as to any of it. This presumption must prevail unless overborne by the terms of the will itself. *Given v. Hilton*, 95 U. S. 591; *Snyder v. Baker*, 5 Mackey, 455.

The first taker is always the favorite object of testator's bounty, and, as such, entitled to every implication. *Barber v. Pittsburgh &c. Ry.*, 166 U. S. 100; and see *Inglis v. Sailor's Snug Harbor*, 3 Pet. 118; *Sheriff v. Brown*, 5 Mack. 172.

Taking *per stirpes* is taking by descent, and is the only mode of succession known to the common law. 2 Blackstone's Comm., c. 32, p. 517.

Where the distribution is to be *per stirpes*, the principle of representation will be applied to all degrees; children never take concurrently with their parents. 2 Jarman on Wills, 5th ed., marginal page 100, and 3 *Id.* 174; *Dengel v. Brown*, 1 App. D. C. 423.

A bequest to A and his children when A has no children, either at the time the will is made or when it takes effect

at the testator's death, vests the absolute property in A. *Van Zant v. Morris*, 25 Alabama, 292.

The binding force of the rule is recognized in *Akers v. Akers*, 23 N. J. Eq. (8 Green) 26; *Nightingale v. Burrell*, 15 Pick. 104; *Moore v. Leach*, 5 Jones' Law (N. C.), 88; *Jones' Ex. v. Jones*, 13 N. J. Eq. 236; *Johnson v. Johnson*, McMullan's Equity (S. C.), 345; *Reader v. Spearman*, 5 Richardson (S. C.), 88; *Chrystie v. Phyfe*, 19 N. Y. 345, 354; *Hamlin v. Osgood*, 1 Redf. 411; *Torrance v. Torrance*, 4 Maryland, 11.

A descendant is one who proceeds from the body of another, however remotely. The word is coextensive with issue, but does not embrace others not of issue. *Estes v. Gillett*, 132 Illinois, 287, 297; *Tichnor v. Brewer's Exrs.*, 98 Kentucky, 349; and see also *Baker v. Baker*, 8 Gray, 101, 120; *Barstow v. Goodwin*, 2 Bradf. 413, 416; *Hauptman v. Carpenter*, 16 App. D. C. 524; *Myers v. Adler*, 6 Mackey, 515; *O'Brien v. Dougherty*, 1 App. D. C. 148; *Richardson v. Penicks*, 1 App. D. C. 261; *Thaw v. Ritchie*, 136 U. S. 519; *McArthur v. Scott*, 113 U. S. 340; *Williamson v. Field*, 2 Sanford's Chancery, 608; *Croxall v. Shererd*, 5 Wall. 288; *Linton v. Laycock*, 33 Oh. St. 128; *Taylor v. Mosher*, 29 Maryland, 454, cited and followed in *Fairfax v. Brown*, 60 Maryland, 50.

In cases of doubt as to whether a remainder be vested or contingent, it is a circumstance of weight in favor of its being the former, where the beneficiaries are the children of the testator. *Boston Safe Deposit Co. v. Blanchard*, 196 Massachusetts, 35; *Smith v. Bell*, 6 Pet. 68. The intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. 15 S. & R. 195; Hawkins on Wills, 2d ed., 222; *Allender v. Kepingler*, 62 Maryland, 12; *Sheriff v. Brown*, 5 Mackey, 176; *Vaughan v. Headfort*, 10 Sim. 641.

The intention of the testator is the first rule of construction to which all other rules are subsidiary. *Earnshaw v.*

Daly, 1 App. D. C. 218; *De Vaughn v. De Vaughn*, 3 App. D. C. 50.

Tested by the decided cases of this jurisdiction, as well as upon principle, the remainder devised to the daughters of Washington Berry is vested and not contingent.

Under the circumstances the court had the power, and it was its duty, to accelerate the time named by the testator in his will for the sale of Metropolis View. *Coltman v. Moore*, 1 MacA. 197; *Trustees v. Morris*, 36 S. W. Rep. 2; *Estate of Rawlings*, 81 Iowa, 701; *Randall v. Randall*, 85 Maryland, 431; *Woodburn's Estate*, 151 Pa. St. 586; *Ferguson's Estate*, 138 Pa. St. 208; *Schulz's Estate*, 113 Michigan, 592; *Vance's Estate*, 141 Pa. St. 201; *Slocum v. Hogan*, 176 Illinois, 539; 1 Jarman, 5th ed., 574; *Blatchford v. Newberry*, 99 Illinois, 11; *Coover's Appeal*, 74 Pa. St. 143.

As to the doctrine of *stare decisis*, as applied to titles of real property, see *Middleton v. Parke*, 3 App. D. C. 149.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is an appeal from a decree of the Court of Appeals of the District of Columbia, which affirmed a decree in favor of the complainant, The Washington Loan & Trust Company. The suit was brought to quiet title, and the question concerns the construction of the fifth clause of the will of Washington Berry, who died in 1856. This clause relates to the testator's homestead—the property known as Metropolis View, containing about 410 acres, in the District of Columbia—and is as follows:

“Item 5th. It is my will and desire that my said homestead shall be kept and continued as the home and residence of my daughters so long as they shall remain single and unmarried. I therefore first after the death of my wife will and devise the said estate to my said daughters being single and unmarried and to the survivor and survivors of them so long as they shall be and remain single and

unmarried and on the death or marriage of the last of them then I direct that the said estate shall be sold by my executors and the proceeds thereof be distributed by my said executors among my daughters living at my death and their children and descendants (*per stirpes*) and I hereby reserve to my heirs the family vault and burial ground embracing half an acre of ground and having the said vault as a centre and on such sale as aforesaid by my executors I earnestly enjoin on my sons or some of these sons to purchase the said homestead that it may be kept in the family."

The will was executed in 1852. The testator had three sons and five daughters, all of whom were living at that time; and they, with his wife, survived him. Four of the daughters married and had children; only one of them was married before the testator's death and her children were born subsequently. One daughter, Eliza Thomas Berry, remained single and survived all her sisters, dying in 1903. The testator appointed his wife and one of his sons executors and trustees; the widow acted as executrix, but the son declined.

Soon after the death of the testator, the widow removed from the homestead and neither she nor any of her unmarried daughters occupied it again. During the war the estate suffered much injury; the vault was destroyed and it was necessary to remove the bodies it had contained; the rent and profits were not sufficient to pay taxes or to provide for repairs and the property fell into a dilapidated condition.

The testator's widow died in 1864. In the following year a suit was brought by three of the married daughters and their husbands in the Supreme Court of the District of Columbia to have the property sold and the proceeds divided among the daughters—save the proceeds of the burial ground and vault, which the bill asked to have distributed among the heirs at law. The other children

of the testator, with the spouses of those that were married, were parties defendant. There were, then living, three grandchildren—by the daughters—but they were not parties or represented. All the defendants, save one married daughter—who was a minor and answered by guardian, submitting her rights to the court—consented to the decree. Eliza Thomas Berry, the unmarried daughter, stated in her answer that she relinquished “upon the sale of the estate in the bill mentioned her right to the possession and enjoyment thereof whilst unmarried,” and consented “to the distribution of the proceeds of sale as prayed.” The case was referred to the auditor to take testimony and report whether the sale would be for the advantage of the infant defendant. He reported that the property was an unfit residence for the unmarried daughter; that the land generally was poor and unproductive as a farm; that the testator had used it as a mere place of residence, and it was fit only, as a whole, for a man of fortune; that the burial place had been demolished and the buildings and fences were out of repair; and that it was a fit case for a sale.

In October, 1865, the court entered a decree for sale, appointing for that purpose two trustees, who were authorized to divide the estate and to sell it in parcels if this were found advisable. The division was made accordingly, and certain lots were sold at public auction. Subsequently, upon the petition of two of the daughters and their husbands, stating that they had children to support and were in need of the money that would come from the sale, the court ordered the trustees to sell the residue of the estate, and sales were made at public auction, which were confirmed by the court in October, 1868, and the proceeds were distributed among the five daughters of the testator. In the long period of years since that time the property has been divided into many separate parcels, which have been the subject of convey-

ances, it being assumed that a valid title passed under the court's decree.

In 1906, suit was brought in the Supreme Court of the District of Columbia by the children of the daughters of the testator against the children of the deceased sons, averring that on the death of the unmarried daughter, Eliza T. Berry, in 1903, the entire equitable interest in the property vested in fee simple in the complainants; that their rights and interests had not been affected by the decree in the former suit or by the sales that had been made under it. It was prayed that trustees might be appointed in the place of those named in the testator's will, to whom the legal title should be transferred. Decree was passed and trustees were appointed by the court on February 20, 1907.

Thereupon Henry P. Sanders brought this suit against all the parties in the suit above mentioned—including the trustees—to quiet the title to a portion of the land which he had derived, by mesne conveyances, through the sale made under the decree passed in 1868; and he alleged that he, and those under whom he claimed, had been for thirty-five years in exclusive and continuous possession, relying upon the validity of their title acquired *bona fide* for a valuable consideration. Mr. Sanders died in 1907, appointing The Washington Loan & Trust Company executor and trustee of his last will and testament by which the real property in question was devised, and an order was made substituting this company as complainant.

It is contended by the appellants that, under the provision of the fifth item of the will, the proceeds of the sale, which the testator directed to be made of the property, should be distributed "among his daughters and their children and descendants as those classes should exist when all of the daughters should be dead or married." The appellee insists that, at the death of the testator, the

daughters took a vested remainder in fee, "to take effect in possession on the marriage of all of them, or the death of the last unmarried daughter."

On examining the scheme of the will, we find that the testator made separate provision for his three sons on the one hand, and for his five daughters on the other. While he contemplated the marriage of his children, and the birth of issue, he did not seek to tie up his property for the benefit of his children's descendants. The testator made no provision whatever for grandchildren or for the descendants of his children save as it was made in the clause in question and in the residuary clause.

To each of his sons he devised a tract of land. The devise was to the son, his heirs and assigns. In the case of two of the sons, it was made on condition that the son and his heirs should convey to the testator's daughters the son's interest in certain real estate, and in case the conveyance were not made within two years, the devise was not to take effect and the property was to go to his daughters living at his death, share and share alike. There was a slight difference in the wording of the conditional devises to the daughters; in the one, they were described as "my daughters living," and in the other as "my daughters living at my death." After thus providing for the sons in the first three items of the will, the testator adds that he annexes to their several estates "this limitation that if either of them shall die without leaving lawful issue that the estate of each one or both if more than one shall go to the survivor or survivors, his and their heirs." We have no occasion to consider the effect of this provision upon the devises to the sons, but it may be noted that there was no gift to the children or descendants of the sons, nor did the testator undertake in case all the sons died without leaving issue to devise the property to the children or descendants of his daughters.

By the fourth item of the will, the testator gave to his

wife for life, in case she survived him, the homestead estate—the property here in question—together with certain money and securities subject to the maintenance and education of his five daughters, while unmarried, and to the provision that each daughter, on marriage and birth of issue, should receive one-sixth part of the personal property bequeathed. When the condition was satisfied by birth of issue, the daughter took her share absolutely. Then followed the fifth clause above quoted, under which this controversy has arisen. And to this was added the residuary clause—item sixth—providing as follows: “I direct that my executors shall divide and distribute all the rest residue and remainder of my personal estate among my children at my death and the descendants of such as may have died during my life to take a parent’s part.”

In the disposition of the homestead, the testator explicitly states his purpose. He was planning for the protection of his daughters. He desired the property to be the home of his widow so long as she lived and that after her death it should continue to be the home of his daughters while they remained unmarried. When this object had been attained, the property was to be sold and the proceeds divided.

These avails were to be distributed “among my daughters living at my death and their children and descendants (*per stirpes*).” The words “living at my death” may not be disregarded. They are not to be eliminated in the interest of a construction which would leave the clause as though it read, “among my daughters who shall be living at the time of the death or marriage of my last unmarried daughter and the children and descendants (*per stirpes*) of such of my daughters as may have previously died.” At the time of the death of the testator, his five daughters were living, and none of them had children or descendants. By the definitive language of the

clause, these daughters were then ascertained and identified as those entitled to the immediate enjoyment of the property on the termination of the preceding estates. They, therefore, had a vested remainder in fee. *Croxall v. Shererd*, 5 Wall. 268, 288; *Doe v. Considine*, 6 Wall. 458, 474-477; *Cropley v. Cooper*, 19 Wall. 167, 174; *McArthur v. Scott*, 113 U. S. 340, 380; *Hallifax v. Wilson*, 16 Ves. 171. The fact that the property was directed to be sold and that they were described as distributees of the proceeds did not postpone the vesting of the interest. "For many reasons," said this court by Mr. Justice Gray in *McArthur v. Scott*, *supra* (pp. 378, 380), "not the least of which are that testators usually have in mind the actual enjoyment rather than the technical ownership of their property, and that sound policy as well as practical convenience requires that titles should be vested at the earliest period, it has long been a settled rule of construction in the courts of England and America that estates, legal or equitable, given by will, should always be regarded as vesting immediately, unless the testator has by very clear words manifested an intention that they should be contingent upon a future event. . . . Words directing land to be conveyed to or divided among remaindermen after the termination of a particular estate are always presumed, unless clearly controlled by other provisions of the will, to relate to the beginning of enjoyment by the remaindermen, and not to the vesting of the title in them. . . . So a direction that personal property shall be divided at the expiration of an estate for life creates a vested interest." In *Cropley v. Cooper*, *supra*, the testator bequeathed the rent of his house to his daughter for her life, and it was provided that at her decease the property should "be sold, and the avails therefrom become the property of her children or child, when he, she, or they have arrived at the age of twenty-one years, the interest in the meantime to be applied to their maintenance." When the testator

died, his daughter, who survived him, had one son about three years old. It was held that the son took a vested interest at the death of the testator. The court said (p. 174): "A bequest in the form of a direction to pay at a future period vests in interest immediately if the payment be postponed for the convenience of the estate or to let in some other interest. . . . In all such cases it is presumed that the testator postponed the time of enjoyment by the ultimate legatee for the purpose of the prior devise or bequest. A devise of lands to be sold after the termination of a life estate given by the will, the proceeds to be distributed thereafter to certain persons, is a bequest to those persons and vests at the death of the testator."

The question remains, whether the interest vested in the daughters was defeasible on condition subsequent. That is, whether on the death of a daughter—before the determination of the preceding estates—leaving descendants, her interest was to be divested and her descendants were to take by substitution.

What, then, was the intent of the testator in providing for the children and descendants of daughters *per stirpes*? If the clause be considered to import a condition subsequent, providing for a divesting of the interest of the daughters who survived him and a substitution of their children and descendants, it would necessarily follow that the children and descendants of daughters who died before him would be excluded from participation. It is difficult to suppose that this was his purpose. That his daughters might marry and die, leaving children, before he died, was undoubtedly contemplated. At the time of his death, one of his daughters had already married. If she survived him, she was to have a share in the property. Did the testator intend that if she died after his death, and before the time for distribution, her interest was to be divested in favor of her children and descendants, and if she died before the testator her children and descendants were

to be barred? Or, if it had happened that three of the daughters had married and died during the testator's lifetime, leaving children, and another daughter had married and died after the testator, were the children of the latter daughter to share in the avails of the property, on the death of the last daughter, unmarried, to the exclusion of all the other daughters' children? It is not to be thought that the testator designed such a purely arbitrary selection unless the words forbid a different interpretation.

The language of the clause is not of this imperative character. As well might it be said that it required the conclusion that the daughters and their respective children and descendants were to take concurrently. But this would not be a sensible construction, and it would seem to be equally contrary to the intention of the testator to imply a condition subsequent and thus not only to make defeasible the interest which passed to the daughters, but to shut out the children and descendants of daughters who predeceased him.

The clause is obviously elliptical, and the provision for representation is not fully expressed. Taking the context and the entire plan of the will into consideration, we believe that what the testator had in mind was to establish the right of his daughters, who survived him, as of the time of his death, and to provide for the representation of any of his daughters, who might previously die, by her children and descendants. So construed, the disposition is a natural one and representation of the same sort is accorded as that provided for in the next paragraph when, in giving to his children the residuary personal estate, the testator fully defined the representation intended by stating that "the descendants of such as may have died during my life" were "to take a parent's part."

We are of the opinion that the remainder in fee which vested in the daughters, all of whom survived the testator, was not defeasible as to any of them by her death, leaving

224 U. S.

Opinion of the Court.

descendants, before the expiration of the preceding estates. As already stated, all the daughters were parties to the suit brought in 1865; and all consented to the decree, save the married daughter who was under age and whose interests were duly protected by the court. It follows that the purchasers under the decree acquired a good title.

The complainant was entitled to the relief sought.

Decree affirmed.
